Supreme Court, U.S.
FILED

(D)

03 849 DEC 8 2003

No. _____

OFFICE OF THE CLERK

In the Supreme Court of the United States

DEBBORAH BROWN, et al.,

Petitioners,

v.

THE UNITED STATES OF AMERICA,
PHILLIP J. CHOJNACKI, et al.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

RAMSEY CLARK
Counsel of Record

LAWRENCE W. SCHILLING
36 EAST 12TH STREET
NEW YORK, NY 10003
(212) 475-3232

Counsel for Petitioners

Becker Gallagher Legal Publishing, Inc.
800.890.5001

73 pp

QUESTIONS PRESENTED

1. Whether an objective observer, informed of the facts, would entertain reasonable questions about Judge Smith's impartiality in this case.

2. Whether petitioners were deprived of a fair trial by Judge Smiths actions in this case.

3. Whether arguments in law for the reversal of the District Courts judgment were presented to the Court of Appeals.

List of Parties

The petitioners herein and all other parties to the appeal in the Fifth Circuit Court of Appeals whose judgment is sought to be reviewed are numerous and are listed in the Appendix.

Table of Contents

Questions Presented i

List of Parties ii

Table of Contents iii

Table of Authorities v

Citations of Opinions and Orders 1

Basis for Jurisdiction 1

Constitutional Provisions and Statutes Involved 1

Statement of the Case 1

A. Prior Proceedings 1

B. February 28, 1993 — The AFT Attack 4

C. March 1-April 19, 1993 — The FBI's Fifty One Day Siege Of The Mt. Carmel Church 5

D. April 19, 1993 — The FBI Assault On The Mt. Carmel Church 7

REASONS FOR GRANTING THE WRIT 9

I An Objective Observer Informed Of The Facts Would Entertain Reasonable Questions About Judge Smiths Impartiality In This Case 9

II. Judge Smith Systematically Acted To Deny The Mt. Carmel Church And Its Members A Fair Trial 24

III. Arguments In Law for The Reversal Of The District Court's Judgment That Were Clear And Convincing Were Presented To The Court Of Appeals 29

Conclusion 30

Appendix

Two Certiorari petitions seeking review of the judgment of the Fifth Circuit Court of Appeals filed on July 14, 2003 are being filed on December 8, 2003, one by Michael Caddell and this petition by Ramsey Clark. The appendix to this petition includes and incorporates by reference the appendix pages attached to the Caddell Petition which begin with page 1a, and the appendix pages attached hereto which begin with page 100a.

District Court Order - 04/21/00 ..... 100a

Constitutional and Statutory Provisions Involved 104a

Memorandum of Law in Support of Motion for Recusal and Transfer Filed 05/29/96 ..... 105a

Affidavit of Bonnie Clark Haldeman 120a

Affidavit of Clive Doyle 124a

Affidavit of Sarah L. Bain 129a

List of Parties 133a

Table of Authorities

Cases **Page**

Andrade, et al v. Chojnacki, et al, W-96-CA-139 1

Andrade, et al v. Chojnacki, et al, 338 F.3d 448 (5th Cir. 2003) 1, 23

Brown v. Reno, W-96-CA-142 ..... *passim*

Castillo v. U.S., 530 U.S. 120 (June 5, 2000), on remand, 220 F.3d 648 (5th Cir. July 28, 2000) 14

Liljeberg v. Health Services Acquisition Corp., 486 U.S. 847 (1988) 14

Liteky v. United States, 510 U.S. 540, 127 L.Ed. 474 (1994) 14, 21-24, 29

In re Murchison, 349 U.S. 133 (1955) 29

Risenhoover v. England, 936 F.Supp. 392 (W.D.Tex. 1996) 10, 13, 19, 23

U.S. v. Branch, 91 F.3d 699 (5th Cir. 1996), cert. denied, 520 U.S. 1185 14

United States v. Grinnell Corp., 384 U.S. 563 (1966) 19

United States v. Phillips, 664 F.2d 971 (5th Cir. Unit B 1981), cert. denied sub nom., Meinster v. United States, 457 U.S. 1136 (1982) 19

Wilson v. U.S., 77 F.3d 105 (5th Cir. 1996) 14

Constitutional and Statutory Provisions

U.S. Constitution Fifth Amendment
Due Process Clause ..... *passim*
18 U.S.C. § 1962, et seq 2

28 U.S.C. § 455(a) ..... *passim*
28 U.S.C. § 455(b)(1) ..... *passim*
28 U.S.C. § 1254(1) 1
42 U.S.C. § 1983 2
42 U.S.C. § 1985 2

Other Authorities

From the Ashes, ed. Lewis, James R., Rowan & Littlefield (1994) 11

Reavis, Dick J., The Ashes of Waco, Simon & Schuster, (1995) 10

Why Waco? Tabor, James D. And Gallagher, Eugene V., University of California Press (1995) 11

Armageddon In Waco, ed. Wright, Stewart A., The University of Chicago Press (1995) 11

Citations of Opinions And Orders

The opinion of the Court of Appeals to be reviewed, is reported, 338 F.3d 448 (5th Cir. 2003), 7a, as is its order denying a petition for rehearing en banc, 2003 U.S.App.LEXIS 21202, 1a. The decision granting the government's motion to transfer these cases from Houston to Waco is reported, 934 F.Supp.2d 817 (S.D. Tex. 1996). The Memorandum Opinion and Order filed on July 1, 1999 on defendants' motions to dismiss is reported 65 F.Supp.2d 431 (W.D.Tex. 1999). The Court's Amended Findings of Facts and Conclusions of Law, filed on September 27, 2000 are reported, 116 F.Supp.2d 778 (W.D.Tex. 2000).

Basis For Jurisdiction

The judgment sought to be reviewed was entered on July 14, 2003. 7a. A petition for rehearing en banc was denied on September 8, 2003. 1a. Jurisdiction for this Court to review the judgment on a writ of certiorari is conferred by 28 U.S.C. sec. 1254(1).

Constitutional Provisions and Statutes Involved

The Due Process Clause of the Fifth Amendment and the provisions of 28 U.S.C. sec. 455(a) and (b)(1) are set forth verbatim in the Appendix, 104a.

Statement of the Case

A. Prior Proceedings

These cases arise out federal law enforcement acts at the Mt. Carmel Church near Waco, Texas from February 28 to April 19, 1993.

Plaintiffs actions were filed in Houston, Texas in 1994 and 1995. Submissions for plaintiffs in the District Court were made principally by attorneys Michael Caddell representing plaintiffs in the case of Andrade, et al v. Chojnacki, et al, W-96-CA-139, and Ramsey Clark, representing the plaintiffs in

Brown v. Reno, W-96-CA-142. In the Court of Appeals, Ramsey Clark continued to represent the Brown plaintiffs and represented additional plaintiffs who were represented by other lawyers at trial at their request. This petition is filed on behalf of the Brown parties and the appellants who joined them in the Court of Appeals.

On the governments motion and over plaintiffs opposition the cases were transferred from Houston to the Waco division of the Western District of Texas in mid-April 1996 where Judge Walter S. Smith was the sole federal judge.

Judge Smith consolidated the cases, and at the end of May 1996 plaintiffs moved to transfer the cases from Waco to San Antonio and to recuse Judge Smith. These motions were denied by Judge Smith on February 18, 1997, 57a. Plaintiffs filed a joint petition for mandamus seeking review of the denial of recusal on April 11, 1997, Dkt. No. 97-50255. The Court of Appeals, without opinion, denied the petition and a suggestion for rehearing en banc in June and September 1997. This Court denied certiorari. 522 U.S. 967 (1997).

New consolidated motions to dismiss were filed by defendants. All discovery continued to be stayed while the motions were pending.

On July 1, 1999, a year and several months after the motions had been completely submitted Judge Smith issued a lengthy decision which dismissed all Bivens claims against all individual defendants, but one, plaintiffs claims under the First, Fourth and Eighth Amendments, under 42 U.S.C. sec. 1983 and 1985 and RICO, 18 U.S.C. sec. 1962 et seq. and several tort claims against the United States under the Federal Tort Claims Act as barred by the FTCA's discretionary function exception and as legally insufficient, e.g. all claims arising during the 51-day stand off, and claims for bystander liability, false imprisonment and abuse of process. 65 F.Supp.2d 431.

The decision dismissed all claims by Brown plaintiffs, without explanation. The Brown plaintiffs immediately moved

for reconsideration of this dismissal, which was clear error. This motion remained pending and the dismissals consequently remained outstanding for nine months, a period during which the plaintiffs represented by Michael Caddell and the United States proceeded with discovery and preparation for trial under considerable time pressure, while Brown plaintiffs were effectively excluded. A principal object of discovery was the FLIR tapes the FBI made on April 19, 1993, which in the view of plaintiffs experts showed gunfire directed at the Church building from FBI shortly before and during the fire.

The pressure to prepare for trial commenced immediately after the July 1, 1999 decision. The next day, on July 2, Judge Smith sua sponte issued a scheduling order, with a discovery cut-off date of September 7, 1999, and a trial date of October 18, 1999.

Faced with an impending trial in a case from which they had all been dismissed, the Brown plaintiffs filed a petition for mandamus on September 3, 1999, Docket No. 99-50844, in which the Caddell plaintiffs did not join. The petition sought, inter alia, continuance of the trial date, recognition of their status as plaintiffs with claims reinstated and assignment of the cases on remand to another judge. The Court of Appeals denied the petition on September 10, 1999, without opinion and without granting any relief.

On April 21, 2000 Judge Smith issued an order partially granting the Brown plaintiffs' motion for reconsideration, which proclaimed its purpose to "clarify" that Brown FTCA claims had not been dismissed on July 1, 1999, 100a. No clarification or explanation was given.

Despite requests by the Brown plaintiffs for continuance of the trial, including a motion filed on June 8, 2000 which Judge Smith denied on June 9, trial of the case before Judge Smith began on June 19, 2000 with the selection of the advisory jury.

On June 12, 2000 Judge Smith advised the parties he had elected to sever the issue whether FBI agents directed gunfire at the Church building on April 19, 1993.

On July 14, 2000 the advisory jury returned a verdict for the government.

On August 29, 2000 Judge Smith cancelled the hearing on the severed FLIR tape gunfire issue previously scheduled for September 18, 2000.

On September 20, 2000, Judge Smith issued an order denying two motions by plaintiffs, including a motion for the Judge's recusal, and amended findings of fact and conclusion of law. 35a. Judge Smith ruled that the Government was entitled to judgment as a matter of law on the gunfire issue, and entered judgment in the government's favor on September 21, 2000.

On September 26, 2000 plaintiffs moved for reconsideration of the judgment and a new trial, based in part on a new gunfire reenactment.

Judge Smith denied the motion for reconsideration on September 27, 2000.

On November 17, 2000 plaintiffs appealed the judgment and the denial of the motion for reconsideration.

The Court of Appeals rendered its decision and judgment in the government's favor on July 14, 2003, ruling there was no error or abuse of discretion in Judge Smith's rulings denying plaintiffs motions for recusal and that the Brown plaintiffs arguments that they were deprived of their constitutional right to a fair trial before an impartial judge in violation of the Due Process Clause did not state a tangible ground for reversal.

A petition for rehearing en banc was denied on September 8, 2003, and this petition followed.

B. February 28, 1993 — The AFT Attack

On Sunday, February 28, 1993 nearly one hundred agents of the Alcohol, Tobacco and Firearms Bureau attempted a long

planned, secret, self styled "dynamic entry" at the Mt. Carmel Church, known to be occupied by more than 100 people, the majority women and children. The attack force was drawn from at least four states. It was aided by three military helicopters. Agents were prepared with ladders for simultaneous entry into upstairs rooms. The agent who led the rush to the front door was armed with a sawed-off shotgun for close quarter combat. The assault failed. The ATF was repulsed leaving four agents and six Church members dead and many wounded. The ATF fired at least 1587 rounds of ammunition into the Church.

The raid was authorized only if the element of surprise was assured. The ATF informed the media of its plans. About an hour before the attack began a member of a TV crew, one of at least ten media people in the area to cover the raid, warned a rural postman not to approach the Church area because it was to be raided. The postman was a member of the Church. He drove to the Church and informed its leaders. An undercover ATF agent Robert Rodriquez was in the Church learned the raid had been discovered and was permitted by suspecting Church leaders to leave. Rodriquez informed his commanders that the Church was alerted to the raid. The raid went forward.

No prior effort to search, or serve a search warrant, or arrest David Koresh off the promises had been made.

C. March 1-April 19, 1993 -- The FBI's Fifty One Day Siege Of The Mt. Carmel Church

The AFT was removed from further participation and the Federal Bureau of Investigation placed in charge with its specially trained national Hostage Rescue Team sharing leadership and playing the dominant role. The Church was surrounded by up to 700 law enforcement officers in what became a 51 day siege. For nearly two weeks FBI strategy included both physical and psychological assaults toward the occupants and Church property and negotiations including

behavioral scientists employing conciliatory, non threatening approaches to persuade Church members to leave the building. Thirty people, 16 children, 9 women and 5 men left the building despite the visible arrest on March 2 of 2 elderly women on first degree murder charges. The negotiating team with behavioral scientists were removed from participation. Several publicly criticized the belligerent tactics employed by the HRT. No one left the Church after March 23.

Thereafter the FBI did everything it could to make life in the Church a living hell for every man, woman and child there. All direct contact with the outside world was cut off. Water, food supplies, medicine and medical care were cut off for all who remained inside. Electricity was cut off for the first time on March 3 despite knowledge of seriously injured people needing medical treatment inside and temperatures dropping to 20 degrees Fahrenheit at night. On March 12, electricity was cut off permanently leaving the Church without lights, refrigeration, appliances, or T.V.

Flash bang grenades were thrown at any Church member seen outside the building and sometimes when seen at an open window. Religious consultants were denied entry into the Church by the FBI. Fifty ton military tanks crushed children toys, and Church members automobiles outside the Church and rumbled close to the wood frame building shaking it night and day. Blinding lights were directed at the Church windows forcing the occupants to cover the windows. Painfully loud noises, chants, amplified screeching of animals, rock music disturbed sleep at night. Offensive gestures including mooning were made toward Church members seen looking out.

The FBI undertook a massive media campaign to defame David Koresh, the Church and the religion making sure its worst propaganda was made known to Mt Carmel Church leaders to demoralize them and to destroy public support for those inside.

Inside the Church, filmed interviews were made during March of more than seventy members including all the children who remained in which they described conditions, greeted friends and relatives outside and expressed their desire to remain together in the Church building. A subsequent report of the Deputy Attorney General dated October 8, 1993 states "Perhaps the most important attribute of those who perished in the April 19 fire was their determination to remain inside the compound." p. 205. It found the videotapes provided "powerful evidence of that attribute." Id.

David Koresh sent religious letters to the FBI on April 9, 10 and 11 and promised in early and mid April that everyone would leave the Church as soon as he finished writing his understanding of the meaning of the Seven Seals discussed in the Book of Revelation. The FBI had received about 30 pages of manuscript and was informed he worked on the manuscript throughout April 17 and 18. One of the nine Church members who escaped the fire on the 19th had the tape of the manuscript she had typed on the night of April 18-19 with her when she leaped from the second floor of the flaming Church.

D. April 19, 1993 – The FBI Assault On The Mt. Carmel Church

The FBI had promised the delivery of milk for the children in the Church on the morning of April 19, as it prepared for a dawn attack. The weather was reported to be warming with high winds. The people inside the Church on April 19, many sick, all exhausted, first became aware that something was happening when FBI loudspeakers began to blare, "This is not an attack." The voice urged them to come out as it had over 51 days.

Armored vehicles including 9 Bradley armored troop carriers, three Combat Engineering Vehicles, tanks fitted with long steel booms with hoses attached and large plow blades and one Abrams tank were used in the assault. Agents in the

Bradleys fired gas grenades into the building, and a buried school bus serving as a tunnel to an underground, partially completed tornado shelter. The CEV's punched holes through the Church walls and injected streams of gas deep into the building. It was 6 a.m.

For six hours the Church was repeatedly saturated with streams of gas from large canisters and approximately 400 individually fired gas missiles. The CEV's crashed into the Church until they were completely inside the exterior wall. The large attached gym with its apartment on top and a dog run along the eve of its roof was smashed to the ground.

By noon the Church was a shambles with gaping, debris filled holes, sagging frame, crushed halls and stairs, cluttered interiors and the gym battered down up to its juncture with the Chapel.

Not a single member of the Church had come out.

The fire hazard in the splintered wood frame building with kerosene and Coleman lanterns throughout for lighting, propane tanks for cooking and high prairie winds as the days got warmer was obvious. No plans for fire prevention, or control were made.

Fire broke out and in less than thirty minutes the entire structure, living quarters for more than 100 people, large dining room, kitchen areas to serve more than 100, study and prayer rooms, offices, storage areas and Chapel were burned to the ground. The image of the fire raging through the Church complex was etched in the memories of millions of people all over the world as it was shown live on T.V., and from film repeated frequently to this day.

No agent of the FBI was injured in service at Mt. Carmel.

Seventy four members of the Church died. Their ages ranged from 14 month old twins to a 76 year old man. Thirteen were under five years old. Of the 61 over 5, 39 were female, two of whom were pregnant and 22 were males. Twenty eight were of African descent, six were Hispanic, six Asian and thirty

four Caucasian. They came from countries as distant as New Zealand and Australia, the Philippines, Israel, England. They included ordained ministers, lay preachers, a lawyer, an architect, musicians and people of wide experience, Bible readers all.

For more than fifty years the Mt. Carmel Church and its congregation had lived peacefully in the Waco area united by daily prayer, religious services and other Church activity. Though different from the predominant churches of this Bible Belt it was accepted, had visitors and adherents from many countries and always had outreach programs assisting neighbors and the poor.

REASONS FOR GRANTING THE WRIT

I An Objective Observer Informed Of The Facts Would Entertain Reasonable Questions About Judge Smiths Impartiality In This Case.

All plaintiffs were aware of Judge Smiths manifested hostility to the Mt. Carmel Church and its members and prejudice in the Waco area inflamed by the intense publicity surrounding the attacks, the siege and continuing thereafter. They filed their complaints during 1994 and 1995 in the U. S. District Court for the Southern District of Texas, Houston Division to avoid that hostility. The defendants challenged venue in Houston and moved to transfer the cases to the U.S. District Court for the Western District of Texas, Waco Division. The cases, with discovery stayed and numerous motions pending, were ordered transferred to Waco where they were received on April 12, 1996 and assigned to Judge Walter S. Smith that same day by order entered on May 3, 1996.

On May 3, 1996, all plaintiffs filed an unopposed motion to hold all pending motions in abeyance pending the filing of motions to recuse Judge Smith and transfer the cases to the San Antonio Division. On May 29, 1996, all plaintiffs timely filed

a joint motion to transfer the cases to the San Antonio Division, or alternatively to recuse Judge Smith. Brown plaintiffs also filed a separate motion to recuse Judge Smith and transfer the case to the San Antonio Division with a Memorandum of Law in Support that same day.

In the supporting memorandum with three affidavits attached, filed on May 29, 1996 four years before trial, Brown plaintiffs presented their arguments for recusal. 105a.

After observing that Judge Smith had been prominently identified in important political, legal and civil positions and activities for years and was considered "a part of the Waco establishment"[1], petitioners noted that Judge Smith had worked extensively with many government officials who participated in various important ways in events lending up to and during the attacks and aftermath whose conduct would be at issue some of whom were themselves defendants. These facts were relevant to the existence and appearance of partiality.

The motion focused largely on Judge Smiths manifestations of hostility toward petitioners religion. He called David Koresh a "false prophet", an epithet inappropriate for a judge to express, irrelevant to any issue before him and an attack on the free exercise of religion. It revealed a deep seated bias that both echoed and infected media and community prejudice.

In Risenhoover, v. England, 936 F.Supp. 392 (W.D.Tex. 1996), Judge Smith stated among other "facts," the majority of which he stated "are not in dispute,"

> "While Koresh's religious teachings did not focus on the 'Golden Rule,' it did focus on para-military training, ... He changed his name legally to David Koresh after another revelation from God, ... [as to Mt.

---

1 Reavis, Dick J., The Ashes of Waco, Simon & Schuster, (1995), p. 280

> Carmel Church], The fort style building was a reflection of Koresh's apocalyptic mentality and preaching, ... Koresh's role as a 'messiah' included exclusive access to all female followers above the age of twelve, including the wives and daughters of his male disciples." Id. at 396-97.

Judge Smith continued to refer to the Church center as a "compound", and demeaned the group by calling it a "cult" and calling its members "Davidians", a name they never used, after objections were raised to the prejudice manifested by such terms in the motion to recuse. Religious scholars particularly have expressed great concern about the prejudice created by such terminology. See e.g., Armageddon In Waco, ed. Wright, Stewart A., The University of Chicago Press (1995), Chapter 4, Construction and Escalation of a Cult Threat and Chapter 5, Self Fulfilling Stereotypes, the Anticult Movement, and the Waco Confrontation; and From the Ashes, ed. Lewis, James R., Rowan & Littlefield (1994). Chapter 10, Cult Label Made Waco Violence Inevitable. See also, Why Waco? Tabor, James D. And Gallagher, Eugene V., University of California Press (1995):

> By admitting "compound" on the ground that it has been used so frequently by the media, however, Judge Smith did not take full account of how the description of Mount Carmel as a "compound" was associated with ... that of an armed camp. Thus, the term was directly linked to the anticult assertion that any cult was a potential Jonestown, dangerous and prone to violence. Id. p. 134.

At sentencing, Judge Smith wrote that the religious beliefs of the members dictated "that they must bring about a violent conflict with federal agents, thereby forcing the agents to use deadly force against them, and by dying in the ensuing battle to be translated immediately to heaven". Sentencing findings, p.

2.

All these statements reveal a prejudiced mind. Judge Smith had no evidence from which he could decide what David Koresh's religious teachings focused on. He repeated the statement verbatim in his July 1, 1999 opinion, 65 F.Supp.2d at 441. His mother said David was thoroughly familiar with the Golden Rule, often discussed it and believed in it, and that

> "Judge Smith has no right to judge David or our religion. We will let the Lord tell us who the true prophets are. ... Judge Smith's claim that David had exclusive access to all female followers above the age of twelve, including the wives and daughters of his male disciples... is a malicious insult to all Church members and our religion, designed to make us appear licentious and duped...." 122a.

Many other prejudicial statements by Judge Smith were related to the religion of petitioners some expressed in terms of their alleged violence. Judge Smith never acknowledged any exercise of religion at Mt. Carmel. His statements at sentencing include "immense preparations" by Church members for violence; "Huge sums were fraudulently charged to many credit cards to acquire an armory that would rival that of a National Guard unit;" "ammunition in an unbelievable quantity," (RT1261), "a literal fortress," (RT1265); "48 machine guns," "preparations for the ambush of February 28," "the first shots were fired from inside the front door of the compound." (RT1265). In contrast, the prosecution referred to these firearms in less inflammatory terms for lay people as AK-47 and M16 rifles "modified to shoot in fully automatic mode." Brief U.S., p. 55. Clive Doyle explained, 126a:

> Paramilitary training was never a part of our religious teaching. Our religious teaching comes from the Bible. A few of the men bought and sold guns and helped

> support the Church with the proceeds. Guns were also kept to protect the Church and its members. We live on earth, in Texas, and guns are part of the culture.

The evidence showed that unopened cases of rifles and ammunition were destroyed in the fire.

In Risenhoover, supra, a case brought against a Waco newspaper on behalf of ATF agents for deaths and injuries in the February 28 raid, Judge Smith wrote that acts of members of the press before the ATF raid on February 28, 1993 were "particularly egregious when considered in light of the fact that they knew how dangerous sect leader David Koresh and his followers were." 936 F.Supp. at 409.

Concerning the attacks on February 28 and April 19 Judge Smith wrote "Koresh slammed the door before the ATF agents could reach it. Gunfire from inside the Compound burst through the door and erupted from windows in the front of the Compound. The ATF agents returned fire." id at 403. "The FBI's decision to mount a forceful assault on the Compound on April 19 ended in tragedy, when the building and all but a handful of its inhabitants were consumed in a conflagration set by the Davidians." id. These statements are a judicial repetition of some of the most prejudicial, hateful and false propaganda circulated to demonize plaintiffs.

For the sentencing in the criminal case Judge Smith wrote "Finally, by the combination of suicide and murder inflicted by Davidian on Davidian, all but a handful of the Davidians were killed," apparently excepting the eight Church members who escaped the fire on April 19. In contrast the U.S. wrote of the 75 Church members who died on April 19: "Many Branch Davidians had killed themselves or been killed by other Branch Davidians. Fourteen adult bodies had fatal gunshot wounds... three young children had fatal gun shot wounds, and one child was fatally stabbed in the chest." Brief for the United States,

U.S. Court of Appeals, p. 54.

Judge Smith's draconian sentences, 40 years for five defendants, were remanded by the Court of Appeals for re-sentencing, U.S. v. Branch, 91 F.3d 699 (5th Cir. 1996), cert. denied, 520 U.S. 1185. Judge Smith then imposed thirty year sentences. The Court of Appeals affirmed, 179 F.3d 321 (5th Cir. 1999). This Court reversed and remanded, Castillo v. U.S., 530 U.S. 120 (June 5, 2000), on remand, 220 F.3d 648 (5th Cir. July 28, 2000)(2-1).

Judge Smith wrote and repeated his views on many of the most important issues presented by petitioners claims without an informed basis for his opinions. No defendant testified in the criminal case. Three defendant Church members were acquitted of all charges. All defendants were acquitted of most charges. The Church and its members, the religion, the deceased children, women and men have never had their day in court.

The memorandum concluded: "It would be devastating to the appearance of justice for this case to be tried in Waco, or by Judge Smith."

The recusal motion was based on 28 U.S.C. sec. 144, 455(a) and 455(b)(1). Its supporting memorandum cited as the test for determining impartiality "whether a reasonable and objective person, knowing all the facts, would harbor doubts concerning the judge's impartiality. Wilson v. U.S., 77 F.3d 105, 110 (5th Cir. 1996), citing Liljeberg v. Health Services Acquisition Corp., 486 U.S. 847, 860-61 (1988)." 106a.

The memorandum quoted extensively from Liteky v. United States, 510 U.S. 540, 550, 127 L.Ed. 474, 487 (1994). It highlighted the example given in Liteky where a judge becomes prejudiced during trial proceedings to show the absurdity of a strict adherence to an "extrinsically acquired" bias rule:

> "Imagine for example, a lengthy trial in which the presiding judge for the first time learns of an obscure religious sect, and acquires a passionate hatred for all its adherents. This would be 'official' rather than 'personal' bias, and would provide no basis for the judge's recusing himself. id.

Had the example been a holding, it would be dispositive here.

The Motion to Recuse was supported by three affidavits. They bring Judge Smith's prejudice into sharp focus. A four page affidavit given by Bonnie Haldeman, a plaintiff, the mother of David Koresh and grandmother of his children who perished with him in the fire of April 19, 1993, included the following: 121a

> I have been a member of the Mt. Carmel Church for many years and was raised as a Seventh Day Adventist. ... The only reason for the existence of our Church was for religious purposes. Mt. Carmel was a place of Bible study and worship. ... We never considered ourselves a "cult." ... We never heard the Church center called a compound until this tragedy. It was a religious center. It is outrageous and ridiculous, and certainly contemptuous, to call the center a fortress. It was church and home. To say the "fort style" of the Church was a reflection of David's apocalyptic mentality is not at all true. Many people contributed to the way the Church building grew. ...

Clive Doyle, a plaintiff and senior member of the Mt. Carmel Church survived the ATF assault on February 28, remained in the Church throughout the siege and escaped from the Church where his daughter died with severe burns as it fell into the flames. He was indicted with other survivors, tried before Judge Smith, and acquitted by the jury on all counts. Judge Smiths anger at all the acquittals was patent. Judge

Smith's hostility toward Mr. Doyle was manifested during this trial, years after the recusal motion was rejected. Judge Smith, came off the bench in a recess after the cross-examination of Mr. Doyle walked to the Prosecutor's table and said "Good job" or as recalled by the prosecution "this time you did it like a real lawyer." Brown counsel did not hear the comments. Mr. Doyle had cried, during cross examination, causing delay, when the prosecutor stated he had saved a dog by throwing it out of the burning Church twice, but did not save his daughter. To congratulate counsel for such an accomplishment reveals deep animus. Mr. Doyle stated in his affidavit 124a-127a

> I have been a member of the Seventh Day Adventist Church since 1951 and of the Mt. Carmel Church since 1957.... I am suing for the death of my youngest daughter, Shari, age 18, whom I was unable to save during the fire on April 19, 1993....
>
> He went far beyond any evidence I heard and said things I know are not true when he said our religious beliefs taught that we "must bring about a violent conflict with federal agents." Our religious belief never caused us to want or bring about a violent conflict with federal agents, or anyone else. David Koresh never preached we should go looking for a fight with anyone. The ATF came after us. We had lived peacefully as a Church group in Waco for years without any trouble. We didn't start the fire in the Church and our members didn't kill each other or commit suicide. Our religion is against suicide and we never discussed it.
>
> He has said the press should have known how dangerous we were before February 28, 1993. We weren't and nobody thought we were, as far as I know. I consider we were on good terms with both the Sheriff's Office and the Police Department and there was no reason for them to consider us dangerous....

> Judge Smith never attended our Church, met its members, heard our Bible discussions, sermons, or participated in our religious studies, yet he says our religious teachings did not focus on the Golden Rule, but on paramilitary training. The Golden Rule was read and discussed in the Church, probably everyday by someone. We believe in the Golden Rule and try to practice it....
>
> For Judge Smith to see the Church as a fortress, or a fort style building, is a reflection of his prejudice. No fortification expert would consider it a fort. It was a religious community center built pretty much with our own hands to serve our religious and living needs. For Judge Smith to write that David Koresh had "exclusive access to all female followers above the age of twelve, including the wives and daughters of his male disciples" reveals his ignorance and prejudice... I don't know where he gets his facts, but he has become a major part of the effort of the government to demonize our religion and Church....

The third affidavit, also five pages, was from Sarah L. Bain who was foreperson of the jury in the criminal trial in San Antonio. She said, App 130a-132a

> I never heard of Judge Walter S. Smith, Jr. before I was called for jury duty in this case....
>
> Evidence of the six hour attack on the people including children at Mt. Carmel with gas and the huge tanks smashing into the building with so many people in it, and finally crushing the back end of the building was probably most disturbing of all. Some jurors said, and I fully agree, that the wrong people were on trial. I never detected that any of this government activity upset Judge Smith...

> ...I was horrified when he imposed 40 years sentences on these men who had already lost family, friends, their home, their Church and their possessions. I believe Judge Smith not only ignored our verdict of not guilty of murder, but that he misused our jury and verdict to punish people he had come to scorn...
>
> The jury did not find and did not have evidence from which we could have found that the Church members ambushed the ATF. It is absurd to say people inside Mt. Carmel ambushed a large, heavily armed force of federal agents that observed the activities at Mt. Carmel for weeks as it planned a dynamic entry by force into the Church. We could not determine and did not decide the first shots were fired from inside the Church. ... The jury did not determine that Church members started the fire. After the FBI had cut off the electricity necessitating the use of Coleman lanterns and after six hours of gassing and tanks smashing a fragile frame building, anything could have started the fire.
>
> I consider myself to be a reasonable person. I firmly believe that any reasonable person reviewing all the facts fairly would have grave doubts, as I do, about the ability of Judge Smith to preside impartially over a trial in which the rights of the Mt. Carmel Church and its members are being asserted against the U.S. government and government agents for the injuries, deaths and devastation that occurred at the Church in 1993.

Judge Smith did not decide the motion for recusal until February 18, 1997 nearly nine months after it was filed. He denied the motion ruling, at 64a and 66a.

> Under either sec. 144 or sec. 455, the movant must establish that any claimed bias arises from an "extra-

judicial" source, and must "result in an opinion on the merits on some basis other than what the judge learned from his participation in the case." United States v. Phillips, 664 F.2d 971, 1002 (5th Cir. Unit B 1981), cert. denied sub nom., Meinster v. United States, 457 U.S. 1136 (1982), quoting United States v. Grinnell Corp., 384 U.S. 563, 583 (1966).

* * *

...Opinions formed on the basis of facts introduced or events occurring during the course of a proceeding, or a prior proceeding, may, however, constitute a basis for recusal if "they display a deep-seated favoritism or antagonism that would make fair judgment impossible." Id. at 1157. The comments identified by Plaintiffs in this case were based upon the undisputed testimony introduced at the criminal trial and in the summary judgment exhibits in the Risenhoover case. In neither case was there a concerted effort made to contest the facts which now concern Plaintiffs; namely, that the Branch Davidians fired first, that the Branch Davidians started the fire that consumed Mt. Carmel, and that the teachings of David Koresh were "para-military" in nature. The defendants in the criminal trial did not testify and did not, therefore, present actual "evidence" to support the assertions raised solely by their attorneys and widely reported in the media as "fact." Additionally, the statements Plaintiffs contest from the Risenhoover case were based upon the pleadings, the uncontroverted summary judgment proof, and the Waco Tribune-Herald's series The Sinful Messiah, which was included as an exhibit. There is, therefore, no "actual" bias or prejudice identified, nor is there anything presented which could lead a reasonable person in full possession of the pertinent

facts to conclude that any bias or prejudice is present merely from the comments and rulings identified by Plaintiffs.

A joint petition by all plaintiffs for a writ of mandamus was filed in the U.S. Court of Appeals for the Fifth Circuit on April 11, 1997. The defendants filed an opposition on May 21, 1997. The Court of Appeals denied the petition without opinion on June 9, 1997. A joint suggestion for rehearing en banc was denied on September 16, 1997. Certiorari was denied November 18, 1997.

On July 1, 1999, years after their initial filing and more than a year after final submissions by the parties, during which a stay of discovery remained in effect, Judge Smith decided the defendants motions to dismiss and for summary judgment in a lengthy Memorandum Opinion and Order, 65 F.Supp.2d 431.

A "Background" section contained "a brief history of the Branch Davidians" with "information from a variety of sources, including media reports, public records, records of Congressional hearings, and, of course, proceedings during the criminal prosecution." id. n . 1 at 441. He stated "much of the background and religious philosophy of Koresh and the Davidians comes from the grand jury and/or trial testimony of" three Branch Davidians who had come to oppose the Church in varying degree. Judge Smith repeated verbatim as fact the claim "While Koresh's religious teaching did not focus on the 'Golden Rule', it did focus on paramilitary training", other statements raised in the motion for recusal and additional comments revealing a deep prejudice against the Mt. Carmel Church.

Among many displays of animus toward the church by Judge Smith which occurred during the pretrial proceedings and trial, his "off the record bench conference" remarks about Church member Livingston Fagan calling him a "crazy,

murdering son-of-a-bitch" again lifts the veil from his animus toward the Church. Brown counsel were not present.

Judge Smith explained his words: "That statement was off the record and in response to another lawyers humorous suggestion, and was not in anyway intended to be taken seriously. The Court regrets the slight to Mr. Fagan's mother, should he have one." The regrets are as crude and revelatory of prejudice as the original statement, even if Judge Smith did not realize that Mrs. Fagan died in the fire on April 19. The Court of Appeals excused the remarks: "...those brief comments in the course of a decade of litigation refer only to one witness, not the Davidians or Appellants in general". 338 F.3d at 462, 32a The explanation is unacceptable. Mr. Fagan was acquitted in the criminal case. There is no rational, or factual basis, for distinguishing Judge Smith's comments about Mr. Fagan from his opinion of other members, or the Church itself.

On appeal, Brown appellants and other plaintiffs at trial who later joined their appeal presented all the grounds for recusal in the joint motion for recusal and the Brown Motion for recusal recited herein, and more, in their first argument, "**I. Judge Smith's Animus Toward the Mt. Carmel Adventist Church Made A Fair Trial Impossible**".

The Court of Appeals in its recitations of General Principles wrote:

> Finally, the origin of a judge's alleged bias is of critical importance. In 1994, the Supreme Court applied a common-law doctrine commonly called the "extrajudicial source rule" to the interpretation of sec. 455. Liteky v. United States, 510 U.S. 540, 555 (1994). As articulated by the Supreme Court, this rule more or less (n1) divides events occurring or opinions expressed in the course of judicial proceedings from those that

take place outside of the litigation context and holds that the former rarely require recusal:

> [n1] The Court's opinion observes that the "extrajudicial source doctrine" and its exceptions are designed to isolate instances where a judge exhibits "wrongful" or "inappropriate" bias or prejudice and such instances will most often, though not always, arise from knowledge gained or relationships existing outside formal proceedings before the judge. Liteky, 510 U.S. at 540. (footnote in original).

Then the Court of Appeals quoted from the lengthy paragraph in Liteky quoted by Judge Smith which concludes:

> opinions formed by the judge on the basis of facts introduced or events occurring in the course of the current proceedings, or of prior proceedings, do not constitute a basis for a bias or partiality motion unless they display a deep-seated favoritism or antagonism that would make fair judgment impossible. Thus, judicial remarks during the course of a trial that are critical or disapproving of, or even hostile to, counsel, the parties, or their cases, ordinarily do not support a bias or partiality challenge. They may do so if they reveal an opinion that derives from an they will do so if they reveal such a high degree of favoritism or antagonism as to make fair judgment impossible." Id. at 555 (internal citations and footnotes omitted).

The Court of Appeals concluded

> Appellants sought Judge Smith's recusal under sec. 455(a) and (b)(1). Their success depends upon their ability to clear the foregoing hurdles. They must (1) demonstrate that the alleged comment, action, or circumstances was of "extrajudicial" origin, (2) place the offending event into the context of the entire trial,

> and (3) do so by an "objective" observer's standard. Moreover, they must demonstrate that the district court's refusal to recuse was not merely erroneous, but, rather, an abuse of discretion. It is hardly surprising that they failed to clear them.

Andrade, supra, 338 F.3d at 454-55, 16a - 19a.

Since Judge Smith identified among the sources for his opinions expressed in judicial proceedings The Waco Tribune-Herald series, The Sinful Messiah, which began February 27, 1993 and continued on February 28, 1993 in his Order denying recusal, 67a and "media reports, public records, records of Congressional hearings" in his Opinion of July 1, 1993, (65 F.Supp.2d n 1 at 441) it is far from clear that any of his comments are intra judicial. The "Sinful Messiah" series of newspaper articles remain an extrajudicial source even if they become an exhibit to a Motion. And judicial opinions are not informed from court proceedings when derived from media reports whether placed in evidence, or not Risenhoover was a case in which the biased opinions were not at issue and in which the Church and its members were not parties.

The bifurcation made by the majority in Liteky sets the near impossible test of "impossibility" for finding bias from opinions expressed by judges in the course of judicial proceedings which require recusal, but surely that standard would not apply to opinions formed by judges from reading newspapers.

"False Prophet" is an epithet whether it comes from a newspaper, T.V. program, or an expert witness on religion testifying in a courtroom. Like the often repeated slogan "While Koresh's religious teaching did not focus on the 'Golden Rule', it did focus on paramilitary training" it is only a catchy phrase revealing animus toward the Church, who ever the original author may be.

If the opinions are considered entirely intra judicial, they still clearly reveal such a high degree of "antagonism as to make fair judgment impossible". And "passionate hatred" against all the adherents "of religious sect" acquired entirely in the courtroom is the very exception cited in Liteky to the rule that opinions framed in the course of judicial proceedings do not often support a bias challenge. Liteky at 550. The effect of the District Court and Court of Appeals rulings in this case as they interpret Liteky is to create a per se rule that immunizes judges from recusal for opinions formed or expressed during the course of judicial proceedings however biased they may be.

Compounding the historic tragedy of the Mt. Carmel Church by the tragedy of a biased judge slandering the Church and dismissing its claims in judicial opinions widely reported in the media raises a profoundly important issue for the Courts of the United States and the confidence of the people in them.

II. Judge Smith Systematically Acted To Deny The Mt. Carmel Church And Its Members A Fair Trial

As the second issue in their appeal in the Fifth Circuit, Brown appellants argued that Judge Smith rulings and conduct in the case deprived them of a fair trial, their day in court, demonstrated actual prejudice and required a new trial before a different judge.

Most damaging of all his acts intended to assure the defeat of plaintiffs claims was his lengthy Memorandum Opinion and Order of July 1, 1999, 65 F.Supp.2d 431. This order devastated all plaintiffs' cases generally.

The Order dismissed all Brown plaintiffs claims without any explanation:

> "ORDERED that all claims presented in ... Brown, et al., v. United States, et al, W-96-CA-142; ... are DISMISSED...."

Id. at 470.

The Brown plaintiffs included the Mt. Carmel Church itself, the prominent leadership of the Church, including David Koresh's mother suing for his death and the deaths of his children, among others; representatives of the Perry Jones family which lost Perry Jones a prominent leader in the Church, age 64, three of his children and six of his grandchildren; representatives of the Wayne Martin family, which lost Wayne Martin, Sr. who made the 911 calls on the morning of February 28, 1993 shouting into the phone "We are being attacked by a hundred armed men", and who was a Harvard Law School graduate, a law professor and practiced law, and four of his children; Floyd Houtman, who died in the fire, age 61, a prominent religious leader; Clive Doyle, a survivor, a member at Mt. Carmel since 1957, who has been the most prominent leader of the Church in Waco since 1993 and all other plaintiffs still living in Waco, all of whom were known in the Waco community. It included more than thirty other plaintiffs, suing for, among others, many children who died in the fire.

The next day, July 2, Judge Smith, sua sponte and without any consultation with the parties lifted the stay order which had been theretofore barred discovery and ordered completion of discovery by September 7, 1999 with jury selection and trial to begin October 18, 1999. The time provided for discovery and trial preparation was impossible even if the problem of dismissal did not exist.

The dismissal of all their claims was psychologically catastrophic for the Brown plaintiffs who were still traumatized by the loss of their loved ones. It stunned their lawyers who had no way to explain what had happened since the Court gave no reason, except the small comfort of saying it must be a mistake. The dismissal confirmed petitioners worst fears of a trial before Judge Smith.

A motion for rehearing was timely filed on July 16, 1999 seeking to reverse the dismissal of all Brown claims, all individual defendants and other rulings. In its first response opposing reconsideration of the July 1, 1999 order, the U.S. took no position on the dismissal of all Brown claims, relief it had not sought. In its reply to the U.S. opposition papers, Brown plaintiffs argued the U.S. had effectively conceded the dismissal was error.

Judge Smith remained silent.

On September 3, 1999, Brown plaintiffs filed a petition for a writ of mandamus seeking reinstatement of their claims and other relief. The petition observed

> "...as these cases plunge head on into the frenetic discovery generated by the Court's arbitrary discovery and trial deadlines, the Brown plaintiffs and others are sidelined without even a reason, right or wrong, being given as to most, [they are] out of the case, with no clear right to appeal at this stage, all individual defendants, are dismissed except one, most claims are dismissed and discovery and trial preparation is impossible."

The Mandamus petition was denied on September 15, 2000. On the same day Judge Smith issued an order sua sponte and ex parte vacating the October 18 trial setting. #267, (R8684).

Three and a half years after the case was assigned to him, Judge Smith set a pre trial conference, sua sponte, for October 15, 1999, prohibiting plaintiffs from attending and pointedly writing it was not necessary for all attorneys of record to attend. Dkt #284 (R9002). Brown counsel met Judge Smith for the first time on October 15, 1999 and urged him to quickly decide the motion for reconsideration of the dismissal of the Brown claims. Judge Smith made no response.

Brown counsel also asked Judge Smith to provide a lengthy discovery period and set trial in the fall of 2000, a time originally recommended by the United States.

On October 22, Judge Smith ordered the United States to complete production of documents by January 15, 2000 and for discovery to be completed by March 1, 2000 with jury selection and trial to begin May 1, 2000. The United States did not provide copies of documents produced to Brown counsel.

On October 22, without any motions having been made for leave to supplement their motions for reconsideration of the July 1, 1999 order, Judge Smith sua sponte gave all plaintiffs 30 days to supplement their motions for reconsideration. Plaintiffs filed additional submissions in November. The year ended without a decision.

Brown counsel attended some depositions. Their presence was variously tolerated, ignored, or objected to. Brown lead counsel never examined FBI agents, or other potential government witnesses, writing a few questions for counsel for other plaintiffs to ask, fearing Judge Smith would strike answers to Brown counsel questions.

Brown counsel filed motions though dismissed from the case on occasion when other plaintiffs had not, in their opinion, protected the interests of plaintiffs, but never received action on them from the Court. They were sidelined and meaningful participation in discovery and preliminary matters was minimal.

To meet a deadline for designating all expert witnesses, Brown counsel filed a designation listing seven experts who had assisted in the Brown opposition to the U.S. Motion to Dismiss and for Summary Judgment. The United States filed a Motion to Strike the Brown designation on March 28, 2000, requesting expedited consideration on the ground that "...the Brown plaintiffs actions have been dismissed, they are in the

same position as if their suits had never been filed and, therefore, they do not have the right to participate in this action." Dck #562, pp. 11391-11394.

Finally, on April 21, 2000, eight months and three weeks after their dismissal with discovery cut off and less then two months remaining before the trial began, Judge Smith filed an order stating in part "...the Court clarifies its previous Order to reflect that ...FTCA claims presented in the Brown I suit were not dismissed...." 100a. No clarifying statement or explanation, was made.

The damage, deliberately inflicted on Brown plaintiffs, was done. Brown counsel struggled through the trial without most discovery documents, copies of most depositions, their own experts excluded by rulings at trial, little ability to prepare to cross examine US witnesses and their own witnesses demoralized by their lengthy exclusion from the case, the limited role their attorney had in the trial and the palpable hostility of Judge Smith.

Even so, had Judge Smith not severed and taken from the jury the issue whether the FBI fired shots into the Church during the assault on April 19 and if Brown experts had been able to testify, the advisory jury would most probably have found for the plaintiffs.

In a case of unique and historical importance, measuring the accountability of the government of the United States and its agents for deaths and injuries, the destruction of a Church and brutal harassment which weigh on the conscience of the country that lived through the entire episode, often watching live television coverage, a fair trial has been denied in violation of the Constitutional right to due process of law and before a judge who has manifested a determination to deny the victims of wrongful acts of their government a fair trial while denying his own actual bias against them.

"A fair trial in a fair tribunal is a basic requirement of due process." In re Murchison, 349 U.S. 133, 136 (1955). Petitioners had neither.

It is important to respect for the judiciary, confidence in the rule of law and trust in the officers of the executive branch of the United States government that these wrongs be righted.

III. Arguments In Law for The Reversal Of The District Court's Judgment That Were Clear And Convincing Were Presented To The Court Of Appeals

All of the issues in appellants brief in the Court of Appeals were argued under two headings:

I. Judge Smith's Animus Toward The Mt. Carmel Adventist Church Made A Fair Trial Impossible

II. Judge Smith Systematically Acted To Deny The Mt. Carmel Church And Its Members A Fair Trial

The first argument began:

> Judge Smith on his own motion should have assigned this case to a Federal Judge who had no connection with its history and parties, who had not revealed a deep prejudice against the Mt. Carmel church, its eighty members who died and its survivors, and who would not create the appearance of bias.

The heading in the first argument is a paraphrase of language from Liteky quoted by the Court of Appeals, 338 F.3d. at 455, 18a.

The brief contained an analysis of the recusal motions filed with Judge Smith including lengthy quotes from them and the affidavits attached to them. It presented all of the acts and statements of Judge Smith set forth in issue I above, and more, in greater detail than is done here, in pages 56 through 70, and stated in its conclusion that "Judge Smith's recusal was required", that the denial of the recusal motions be reversed and that the case be remanded with instructions that it be assigned

to a different district for further proceedings.

The second argument, that Judge Smith systematically acted to deny the Mt. Carmel Church and its members a fair trial was set forth in pages 70-109. It included all of the acts of Judge Smith set forth in issue II above and in greater detail plus many other acts of Judge Smith that denied petitioners a fair trial. It ended:

> The members of the Mt. Carmel Church have not had their day in Court. Their rights have been collectively denied by a prejudiced judge.

The Brown appellants arguments in law were clearly discernable and the grounds for reversal were clearly presented. In its brief the government precisely discerned the two issues raised in appellants brief as "recusal under 28 U.S.C. sec. 455" and "bias depriving plaintiffs of a fair trial under the Due Process Clause." Govt. Brief at p. 46.

To the extent that the Court of Appeals has held that petitioners have not presented these issues on appeal, it has denied them their right to appeal, elevating some undefined and apparently technical requirement above constitutional rights and simple justice.

Conclusion

A writ of certiorari should be granted.

December 8, 2003

Respectfully submitted,

Ramsey Clark
Counsel of Record
Lawrence W. Schilling
36 East 12th Street
New York, NY 10003
(212) 475-3232

Table of Contents

Two Certiorari petitions seeking review of the judgment of the Fifth Circuit Court of Appeals filed on July 14, 2003 are being filed on December 8, 2003, one by Michael Caddell and this petition by Ramsey Clark. The appendix to this petition includes and incorporates by reference the appendix pages attached to the Caddell Petition which begin with page 1a, and the appendix pages attached hereto which begin with page 100a.

District Court Order - 04/21/00 ..... 100a

Constitutional and Statutory Provisions Involved 104a

Memorandum of Law in Support of Motion
for Recusal and Transfer Filed 05/29/96 ..... 105a

Affidavit of Bonnie Clark Haldeman 120a

Affidavit of Clive Doyle 124a

Affidavit of Sarah L. Bain 129a

List of Parties 133a

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
WACO DIVISION

Civil No. W-96-CA-139 and consolidated with: W-96-CA-140 W-96-CA-141 W-96-CA-142 W-96-CA-143 W-96-CA-144 W-96-CA- 145 W-96-CA- 146 W-96-CA-147 W-96-CA-373

[Filed April 21, 2000]

ISABEL G. ANDRADE, et al.,	)
Plaintiffs,	)
	)
v.	)
	)
UNITED STATES OF AMERICA.,	)
Defendant.	)
	)

ORDER

Plaintiffs have filed motions for the Court to reconsider its previous Order dismissing many Plaintiffs and many of their claims. Having reviewed the motions and the Government's response, the Court has determined the motions are partially meritorious and should be partially granted.

Initially, the Court clarifies its previous Order to reflect that the properly filed and exhausted FTCA claims presented in the *Brown I* suit were not dismissed, nor was the properly exhausted FTCA claim of Debra K. Brown in the *Ferguson* suit.

Plaintiffs have presented nothing to the Court, however, to persuade it to reconsider the dismissal of Plaintiffs' *Bivens* claims. Plaintiffs present nothing to justify reinstating any claims against Defendants Jeffrey Jamar and Richard Rogers. Despite the months of discovery, Plaintiffs have presented nothing that would overcome either Defendant's qualified immunity to suit. Nor have Plaintiffs presented anything that would support *Bivens* liability against any individual Defendant. Therefore, the only remaining claims in this lawsuit are those against the United States under the FTCA.[1]

The *Brown* Plaintiffs additionally request the Court to reconsider its Order dismissing the claims asserted in *Brown II* for failing to have the Government timely served and dismissing the claims of Clive Doyle and Vailoa Vaega presented in *Brown I* for failing to properly initiate their claims under the FTCA. Having reviewed the Plaintiffs' brief, and reconsidering the claims presented, the Court is persuaded that the claims of Clive Doyle and Vailoa Vaega presented in *Brown I* were properly exhausted under the FTCA. The amendments subsequently submitted did not reinitiate the six-month period. Further, the Court is persuaded that the *Brown I* Plaintiffs should be given one more attempt to successfully serve their complaint on the Government.

The Court has additionally considered the motion for partial dismissal and partial summary judgment presented by the United States. Having reviewed the motion and the Plaintiffs' response, the Court has determined that too many material fact issues are presented to justify dismissal or summary judgment as to the claims remaining in this lawsuit. In light of the

---

[1] Plaintiffs' claims against the sole remaining Defendant, Lon Horiuchi, were voluntarily dismissed.

foregoing, it is **ORDERED** that the Plaintiffs' Motions for Reconsideration and Clarification (Documents #214, 215, 320, 323, 421) are partially **GRANTED** to the extent noted above. As the Court has considered all briefs filed in relation to these matters, it is further **ORDERED** that the Plaintiffs' Motion for Leave to File a Supplemental Response (#429) is also **GRANTED**. As the *Brown* Plaintiffs are still parties to this suit, the Government's Motion to Strike the *Brown* Plaintiffs' experts (#562) is **DENIED**. It is further

ORDERED that the *Brown II* Plaintiffs properly serve a copy of their complaint on the United States of America within eleven (11) days from the date of this Order. Failure to comply with this Order within the time provided, and within the manner prescribed by the Federal Rules of Civil Procedure, will result in a final dismissal of those Plaintiffs in *Brown II*, for which there will be no additional reconsideration. It is further

ORDERED that the *Brown* Plaintiffs notify the Court within eleven (11) days of the date of this Order as to the proper identity of those Plaintiffs serving in an administrative capacity for the estates of the deceased. If the administrator is not a proper family member identified in the Texas statutes, Plaintiffs shall provide proof of their administrative capacity. All duplicate administrators will be dismissed after this eleven-day period. It is further

ORDERED that the Plaintiffs' Motions to Reconsider Dismissal of Jeffrey Jamar and Richard Rogers (#428, 431, 440) are **DENIED**. It is further

ORDERED that the Government's Motion for Partial Dismissal and for Partial Summary Judgment is **DENIED**. It is further

ORDERED that the following remaining pending motions are **GRANTED**: (1) Government's Motion for Enlargement of Time to Submit Expert's Report and for Temporary Custody of Evidence (#461); and (2) Plaintiffs' Motion for attorney David T. Hardy to appear pro hac vice (#533). The following remaining pending motions are **DENIED**: (1) Plaintiffs' Motion for Sanctions for Failure to Comply with Scheduling Order (#359); (2) Plaintiffs' Motion to Extend Time to Apply for Reconsideration of Dismissal of Individual Defendants (#379); and (3) Plaintiffs' Motion to Compel Answer to Interrogatory No. 11 (#381).

IT IS SO ORDERED.

SIGNED this 21st day of April, 2000.

/s/_____

WALTER S. SMITH, JR.
United States District Judge

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitution of the United States

Amendment -- Article [V]

No person shall . . . be deprived of life, liberty, or property, without due process of law; . . .

28 U.S.C. § 455

§ 455. **Disqualification of justice, judge, or magistrate judge**

(a) Any justice, judge, or magistrate judge of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

(b) He shall also disqualify himself in the following circumstances:

(1) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;

* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
WACO DIVISION

Brown v. U.S.
Docket No. W-96-CA-142

Andrade v. Chojnacki
Docket No. W-96-CA-139

[Filed May 19, 1996]

ISABEL G. ANDRADE, et al,	)
Plaintiffs,	)
	)
v.	)
	)
PHILLIP J. CHOJNACKI, et al,	)
and	)
UNITED STATES OF AMERICA,	)
Defendants.	)
	)

Memorandum of Law in Support of Motion
for Recusal and Transfer
Dated May 28, 1996

Before any other action is taken in these proceedings, the court should rule on motions for recusal of the Honorable Walter S. Smith, Jr. based on 28 U.S.C. §§144, 455(a) and 455(b)(1). Issues raised by the motions are, 1) whether Judge Smith has a personal bias or prejudice against plaintiffs; 2) whether Judge Smith's impartiality might reasonably be questioned in these proceedings; 3) whether Judge Smith has

personal knowledge of disputed evidentiary facts concerning the proceedings.

Based on the timely and sufficient affidavits of bias and prejudice, the certificate of counsel accompanying the motion, the reasonableness of doubts concerning Judge Smith's impartiality, and his personal knowledge of disputed evidentiary facts, another judge must be assigned to hear the proceeding. See, 28 U.S.C. §§144, 455(a) (b). The test for determining impartiality is "whether a reasonable and objective person, knowing all the facts, would harbor doubts concerning the judge's impartiality." Wilson v. U.S., 77 F.3d 105, 110 (5th Cir. 1996), citing, Liljeberg v. Health Services Acquisition Corp., 486 U.S. 847, 860-61 (1988).

A. Personal Bias, Or Prejudice

This case was transferred from the U.S. District Court for the Southern District of Texas, Houston Division, after the Court found that venue in Houston was improper. Plaintiffs promptly gave notice of their intention to file motions for recusal of Judge Smith and transfer of the case to another division of the Wester District and filed such motions within the time set by the court. See, Travellers Ins. Co, v, Liljeberg Enterprises, Inc., 38 F.3d 1404, 1410 (5th Cir. 1994). Affidavits are being filed by Bonnie Clark Heldeman, Clive Doyle, and Sarah L. Bain stating the facts and reasons for their belief that Judge Smith has personal bias, or prejudice against plaintiffs that a reasonable person would have doubts about his impartiality and that he has personal knowledge of disputed evidentiary facts. The affidavits are timely and sufficient to require recusal because of the highly biased and prejudicial statements and action by Judge Smith toward plaintiffs, their Church, religious leader and members of the Congregation.

B. The Facts and Appearance Create Reasonable Doubt In An Objective Person Concerning The Judge's Impartiality

"On February 28, 1993, an American tragedy of epic proportions took place near the community of Elk" (RT1260 Sentencing Findings and Opinion in U.S. v. Branch). More precisely, it took place at the Mt. Carmel Church Center occupied by over 100 religious people, and continued toward far greater tragedy through April 19, 1996 leaving eighty Church members, more than two thirds women and children and four federal agents dead.

The events involved the largest, most violent, deliberately cruel and ultimately deadly police action against a Church group in U.S. history. Federal forces, supported by the Texas National Guard, assaulted the Church, surrounded and tormented its occupants for seven weeks then gassed and battered the building for six hours until fire engulfed it and nearly all its remaining occupants in a matter of minutes. This dramatic and traumatic assault by the U.S. on a religious establishment was watched daily worldwide on television. Those who died and their relatives, the Church itself, survivors and all Church members have been subjected to a relentless, intense campaign of demonization by federal officials, agencies and others seeking to make them evil, denying or denigrating their religion, and blaming them for all the deaths and injuries including their own.

Plaintiffs are close relatives of the eighty children, women and men who died, plus several of the "handful" of survivors. They seek to hold the United States, its officers and State officials accountable. They have suffered unbearably, lost nearly everything and they want justice.

It will be difficult to find greater fear, prejudice and hatred against any people who are simultaneously opposed by such a powerful range of governments and other interests, than this Church group. Our judiciary faces an enormous challenge and high duty to present the appearance and insure the actuality of freedom from judicial and community bias and prejudice in this proceeding. Judicial economy carries no weight compared to fundamental importance of the appearance of fairness presented here.

Judge Smith has been prominently identified with Waco, Texas for many years in important political, legal and civic positions and activities. He has been described as "a part of the Waco establishment."[1] He is intimately and inextricably identified with the community, its interests, institutions and its governments.

Judge Smith expressed the opinion "that it would be difficult if not impossible to seat a fair and impartial jury in the Waco Division" in granting a change of venue in the criminal trial. While he is a trained lawyer and judge, he is human, subject to all the emotions of the community, and he has a history of loyalty and service to the community and its institutions, government agencies and personnel. He has manifested hostility and harshness toward plaintiffs, their Church and their religion and created the appearance of bias and prejudice. Following the April 19, 1995, bombing in Oklahoma City, the U.S. Court of Appeals for the Tenth Circuit considering the totality of the circumstances passed over all the federal district judges in Oklahoma for "an available judge

---

[1] Reavis, Dick J., The Ashes of Waco, Simon & Schuster, (1995), p. 280.

from a very large pool of judges outside the State of Oklahoma," Nicols v. Alley, 71 F.3d 374 (10th Cir. 1995), and changed venue for the trial to Colorado to preserve the appearance of justice. Judge Smith knows and has worked extensively with many of the government officials who participated in various ways in events leading up to this tragedy, the tragedy itself and its aftermath, some of whom are defendants whose conduct will be at issue in the proceedings. The criminal trial over which he presided involves many controversial decisions he made against defendant Church members. The appeal to the Court of Appeals of the criminal convictions is sub judice and will almost certainly be decided during proceedings in these cases. For Judge Smith to preside over these cases while the appeal challenging the correctness of his actions and rulings is pending, awaiting decision, adds to the appearance of injustice. One of the cases Judge Atlas sent to Waco is Gyarfas which was originally filed in Waco. Judge Smith made several important decisions adverse to the plaintiffs in that case which was inadequately plead and briefed. Plaintiff voluntarily dismissed the surviving claims and refiled in Houston to avoid further proceedings before Judge Smith because of his bias against plaintiff. All of the plaintiffs now risk prejudice because of those proceedings.

Among the acts and omissions of Judge Smith which manifest his personal prejudice, or bias toward plaintiffs and their religion, and seriously question his impartiality are:

1. Judge Smith has never recognized that plaintiffs were exercising their religion at Mr. Carmel Church.

2. He has never shown anything but contempt, or worse, for the Church, its members or its children.

3. He has chosen to refer to the Church center as a "compound," and demeaned the group by calling it a "cult" and calling its members "Davidians." Religious scholars particularly have expressed great concern about the prejudice created by such terminology. See e.g., Armageddon In Waco, Chapter 4, Construction and Escalation of a Cult Threat and Chapter 5, Self Fulfilling Stereotypes, the Anticult Movement, and the Waco Confrontation;[2] From the Ashes, Chapter 10, Cult Label Made Waco Violence Inevitable.[3]

> By admitting "compound" on the ground that it has been used so frequently by the media, however, Judge Smith did not take full account of how the description of Mount Carmel as a "compound" was associated with the negative depiction of a "cult." Despite the judge's comparison, the repeated use of the term "compound" in the press hardly conjured up images of the Kennedy family's palatial seaside estates. Instead, the dominant image of Mount Carmel was that of an armed camp. Thus, the term was directly linked to the anticult assertion that any cult was a potential Jonestown, dangerous and prone to violence. Tabor, p. 134.[4]

4. For the sentencing of Church members convicted in the criminal trial, Judge Smith has written compassionately of the "homicide of four young agents," (RT1260), though the

---

[2] Armageddon In Waco, ed. Wright, Stewart A., The University of Chicago Press (1995)

[3] From The Ashes Making Sense of Waco, ed. Lewis, James R., Rowan & Littlefield (1994)

[4] Tabor, James D. and Gallagher, Eugene V., Why Waco, University of California Press (1995)

defendants in the criminal case were acquitted of all murder counts, while in contrast referring only to "the deaths of residents of the building." (RT1261).

5. He wrote for the sentencing, "Finally, by the combination of suicide and murder inflicted by Davidian on Davidian, all but a handful of the Davidians were killed," apparently excepting the eight Church members who escaped the fire on April 19. In contrast the U.S. wrote of the 75 Church members who died on April 19: "Many Branch Davidians had killed themselves or been killed by other Branch Davidians. Fourteen adult bodies had fatal gunshot wounds. . . three young children had fatal gun shot wounds, and one child was fatally stabbed in the chest." Brief for the United States, U.S. Court of Appeals, p. 54.

6. For the sentencing, Judge Smith wrote of the religious belief of the members "that they must bring about a violent conflict with federal agents," of "immense preparations" by Church members for violence; "Huge sums were fraudulently charged to many credit cards to acquire an armory that would rival that of a National Guard units;" "ammunition in an unbelievable quantity," (RT1261), "a literal fortress," (RT1265) ; "48 machine guns," "preparations for the ambush of February 28," "the first shots were fired from inside the front door of the compound." (RT1265) . In contrast, the prosecution referred to these firearms in less inflammatory terms for lay people as AK-47 and M-16 rifles "modified to shoot in fully automatic mode." Brief U.S., p. 55. All of these words were written by Judge Smith with emotion and animus and greatly exaggerated, or were unsupported in fact. The Church had been in the Waco area for sixty years. There has been only one violent incident reported and one indictment charging any of its members with violence. It resulted in acquittals of all defendants except one and a hung jury as to him.

7. He has been criticized widely by the media and by members of the criminal trial jury including the foreperson for failing to respect the jury verdict, not guilty for all defendants on Counts I and II of conspiring to murder federal officers and aiding and abetting in such murder. He then initially set aside verdicts of guilt returned against five of the 11 defendants as to Count III and after the jury was discharged, he then reinstated Count III and imposed draconian forty year sentences against five defendants as if they had been convicted of murder, shocking former jury members who had requested leniency, the defendants, their families and Church members and much of the public.

8. Judge Smith has written in an opinion in a case brought against a Waco newspaper on behalf of ATF agents for deaths and injuries in the February 20 raid that acts of members of the press before the ATF raid on February 28, 1993 were "particularly egregious when considered in light of the fact that they knew how dangerous sect leader David Koresh and his followers were." Risenhoover, p. 41. In that opinion, he has stated among other "facts," the majority of which he says "are not in dispute," p. 6; "While Koresh's religious teachings did not focus on the 'Golden Rule,' it did focus on para-military training," p. 7; "He changed his name legally after a revelation from God," p. 8; as to Mt. Carmel Church, "The fort style building was a reflection of Koresh's apocalyptic mentality and preaching," p. 8; "Koresh's role as a 'messiah' included exclusive access to all female followers above the age of twelve, including the wives and daughters of his male disciples." p. 8-9; "Koresh slammed the door before the ATF agents could reach it. Gunfire from inside the Compound burst through the door and erupted from windows in the front of the Compound. The ATF agents returned fire." p. 24; "The FBI's decision to mount a forceful assault on the Compound on April 19 ended in tragedy, when the building and all but a handful of

its inhabitants were consumed in a conflagration set by the Davidians." p. 25. These statements are a judicial repetition of some of the most prejudicial, hateful and false propaganda circulated to demonize plaintiffs.

9. Judge Smith's conduct of the criminal trial proceedings caused widespread criticism that he was prejudiced against Mt. Carmel Church, its leaders and members. See, e.g. Moore, pp. 438, Prejudiced Judge Frustrated Defense Efforts, et seq.[5] The Ashes of Waco, supra, at 281: "Judge Smith showed his sympathy for the prosecution early, in several ways."

10. Judge Smith was under investigation by the Department of Justice on charges of perjury in an unrelated matter from the time the criminal case against the Mt. Carmel Church members was assigned to him until the last few weeks of the trial when the Department of Justice announced he had been cleared. The case was the most important matter to the Department of Justice as an institution in the country at the time.

11. He made religious judgments inappropriate for a federal judicial officer calling David Koresh a "false prophet." Risenhoover, p. 8.

It would be impossible for a reasonable and objective person, knowing all the facts, to believe Judge Smith could be impartial. His bias and prejudice against plaintiffs, their religion and Mt. Carmel Church is too clear.

Judge Atlas did no have and could not properly have had a motion to recuse Judge Smith before her. She was presented

---

[5] Moore, Carol, The Davidian Massacre, Legacy Communications & Gun Owner Foundation (1995)

facts and arguments against transfer to Waco. While she specifically declined to rule on the issue of recusal, however, she did write that evidence of bias based solely on a judge's prior rulings does not create a basis for recusal. (Atlas opinion, p. 29). She erred twice. First the evidence described above and alluded to in papers before Judge Atlas do not constitute prior rulings of Judge Smith. Second, as the Supreme Court has recently held, "Bias and prejudice seem to us not divided into the 'personal' kind which is offensive and the 'official' kind, which is perfectly all right," concluding that a rule creating "a complete dichotomy between court-acquired and extrinsically acquired bias produces results so intolerable as to be absurd." Liteky v. United States, 127 L. Ed. 474, 487 (1994).

Well before Litkey, bias or prejudice acquired entirely in judicial proceedings had been held sufficient to require recusal. U.S. v. Holland, 655 F.2d 44, 47 (5th Cir. Unit B 1981) (per curiam); see also Davis v. Board of School Commissioners, 517 F.2d 1044, 1051 (5th Cir. 1975), cert. denied, 425 U.S. 944 (1976). All that must be demonstrated to compel recusal under § 455 is a showing of an appearance of bias or prejudice sufficient to permit "the average person on the street" reasonably to harbor doubts about a judge's impartiality. Potashnick v. Port City Const. Co., 609 F.2d 1101, 1111, (5th Cir. 1980); U.S. v. Heldt, 668 F.2d 1236, n. 6 at 1271 (D.C. Cir. 1981) (collecting cases).

The example used by the Supreme Court in Liteky to illustrate the obvious necessity of recusal where a judge becomes prejudiced during trial proceedings, which if it had been a holding would be dispositive here, shows the absurdity of a strict adherence to an "extrinsically acquired" bias rule:

> "Imagine for example, a lengthy trial in which the presiding judge for the first time learns of an obscure

> religious sect, and acquires a passionate hatred for all its adherents. This would be 'official' rather than 'personal' bias, and would provide no basis for the judge's recusing himself. Liteky v. U.S., supra at 487.

Judge Smith has written and repeated his views on many of the most important issues presented by plaintiffs' claims without an informed basis for his opinions. No defendant testified in the criminal case. Three defendant Church members were acquitted of all charges. All defendants were acquitted of most charges. The Church and its members were not present in Risenhoover. The Church and its members, the religion, the deceased children, women and men have never had their day in court. But Judge Smith has decided against them. This reflects a prejudice, or pre-judgment, by definition, and when considered in context reveals an animus toward plaintiffs and a desire to hurt them. Among issues he has decided in his own mind are "the beliefs of the Branch Davidians, expressed and taught by their leader, that they must bring about a violent conflict with federal agents," Church members made "preparations for the ambush of February 20," "the first shots were fired from the inside the door," "by a combination of suicide and murder inflicted by Davidian on Davidian, all but a handful of the Davidians were killed," RT1261. As noted above, Judge Smith has repeatedly and gratuitously defamed plaintiffs, religion, Church, and never expressed sorrow even for the children who died. He has said they ignore the "Golden Rule," but focus on paramilitary training. He has called their dead leader a "false prophet."

Plaintiffs reject all these statements by Judge Smith. They will prove that they were innocent victims of a carefully planned, surprise attack by a major force of heavily armed federal agents who killed six Church members and injured many more. The Church members did not ambush the ATF, did

not seek a violent conflict with agents and did not fire first. For 51 days they were subjected to the greatest torments the FBI could devise and finally their Church was gassed for six hours, filled with toxic, combustible materials, they were fired at by FBI agents with automatic rifles, gas canisters and pyrotechnic missiles. The Church was smashed by 50 ton tanks, crushing walls and collapsing major portions of the structure. The Church members did not start a fire and did not kill themselves. The Church was ignited by pyrotechnic devices fired at and into the Church by FBI agents causing it to be completely consumed by fire in twenty minutes, killing 74 Church members, more than 50 women and children.

There will be voluminous evidence, not available and not considered in the criminal trial, presented by plaintiffs as indicated in their responses to defendants' motions for summary judgment. Judge Smith's patent prejudice would cause him to resist such evidence and support his prior views.

It would me devastating to the appearance of justice for this case to be tried in Waco, or by Judge Smith.

C. Judge Smith Has Personal Knowledge Of Disputed Evidentiary Facts Concerning The Proceedings

ATF Agent Davy Aguilera prepared with others an affidavit in December 1992 in which he alleged that a number of persons residing at Mr. Carmel had histories of prior drug involvement. In that affidavit he named Roy Lee Wells and Donny Joe Harvey as narcotics traffickers who are residents at Mt. Carmel where he said a methamphetamine lab was located. Mr. Wells was arrested on January 22, 1988 and has been in federal custody since. Judge Smith presided over the trial in Waco in 1988 in which Roy Lee Wells was convicted of conspiracy to manufacture methamphetamine with intent to distribute and as

an armed career criminal. Judge Smith sentenced Mr. Wells to 240 and 480 months on these two convictions. Danny Joe Harvey testified in Mr. Wells' trial. He was in custody in 1988 and has been in federal custody since for firearms violations.

Assistant U.S. Attorney William Johnston and ATF Agent David Aguilera both have known of Mr. Wells and Mr. Harvey's arrests, convictions and continuos confinement since 1988. Mr. Wells and Mr. Harvey are presently confined at FCI, El Reno, Oklahoma. Agent Aguilera and AUSA Johnston were key figures in the ATF planning and raid of February 28 and at the criminal trial. Both are defendants in this case.

Judge Smith has personal knowledge that Mr. Wells and Mr. Harvey have not been residents at Mt. Carmel, if they ever were, since January 22, 1988.

The Aguilera affidavit described above was used to cause the U.S. Department of Defense and the Texas National Guard to provide military training, equipment including helicopters, tanks, combat engineering vehicles, armored personnel carriers, other military materiel and U.S. Army and Texas National Guard personnel for the initial attack, the subsequent 51 day siege and the final six hour assault on the Mt. Carmel Church. This affidavit and the related February 25, 1993 affidavit of Agent Aguilera in support of the application for search and arrest warrants at the Church which did not include allegations about Wells and Harvey, or a methamphetamine lab, will involve contested issues of fact in these proceedings as to which Judge Smith has personal knowledge.

D. This Case Should Be Transferred To The San Antonio Division Of This Court

After a decision on the motion to recuse is final, plaintiffs seek transfer of the proceedings pursuant to 28 U.S.C. §1404(b) to the San Antonio Division of this Court on the basis of facts presented and reasons urged in prior proceedings in this case in Houston concerning venue and trial in Waco and on the basis of facts and arguments for such transfer that are now being submitted to this Court in Andrade and its companion cases.

Conclusion

The actual bias and prejudice of Judge Smith against plaintiffs, their religion and their Church, the overwhelming appearance of unfairness and injustice arising from a trial of this case before Judge Smith, the unquestionable reasonableness of doubts in the minds of any objective person, knowing all the facts, concerning Judge Smith's impartiality and Judge Smith's personal knowledge of critical and contested facts in the case all require his recusal. For Judge Smith to cling to this case, or for it to be tried in Waco, would cause profound distrust and disillusionment in the commitment of the judiciary to fair trials, protection for the free exercise of religion and concern for the appearance of justice in a case that deeply troubles people all over the world.

This case requires a judge unencumbered by manifest bias, personal knowledge and the appearance of zealous partiality. "Public respect for the judiciary demands this result." United States v. Jordan, 49 F.3d 152, 157 (5th Cir. 1995).

Dated: New York, New York
May 28, 1996

Respectfully submitted,

/s/_____
Ramsey Clark

/s/_____
Lawrence W. Schilling
36 East 12th Street
New York, N.Y. 10003
(212) 475-3232

Scott W. McQuaig
Russell A. Solomon
Robert G. Harvey, Sr.
One Galleria Blvd.
Suite 1500
Metaire, Louisiana 70001-7502
(504) 836-5070

Attorneys for the Plaintiffs

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
WACO DIVISION

Docket No. W-96-CA-142

JUDGE WALTER S. SMITH, JR.

DEBBORAH BROWN, et al,)
Plaintiffs,)
)
v.)
)
UNITED STATES OF AMERICA, et al.,)
Defendants.)
)

STATE OF TEXAS)
) SS
COUNTY OF)

AFFIDAVIT OF BONNIE CLARK HALDEMAN

Before me, the undersigned authority, personally appeared Bonnie Clark Haldeman, who, being by me duly sworn, deposed as follows:

1. My name is Bonnie, Clark Haldeman. I am the mother of David Koresh, the mother-in-law of Rachel Jones Koresh and the grandmother of Cyrus Ben Joseph Howell, deceased; Star Hadassah Howell, deceased; Serenity Sea Jones Koresh, deceased; Dayland Lord Gent, deceased; Paiges Gent, deceased; Bobble Lane Koresh, deceased; Chica Jones Koresh, deceased; Little One Jones Koresh, deceased; Startle Summers,

deceased, Chanel Andrade, deceased; and Mayana Schneider, deceased. I am a plaintiff in this case and bring suit for the deaths of my son and my grandchildren as well as for myself. I have been a member of the Mr. Carmel Church for many years and was raised as a Seventh Day Adventist.

2. I have been asked by my lawyers to give this affidavit in support of a motion by plaintiffs asking that Judge Walter S. Smith, Jr., be disqualified from presiding over the case.

3. The only reason for the existence of our Church was for religious purposes. Mt. Carmel was a place of Bible study and worship. A great part of each day was spend in Bible readings and discussions. It was for the purpose of studying the Bible that members came from many countries. In order to facilitate this study many made Mt. Carmel their temporary home.

4. We never considered ourselves a "cult." We understood this was a very negative term. We believed in the right of everyone to choose the religion they believed in. Our faith was a subject of constant discussion and analysis. Our members were free to choose and exercise their religious faith. This created vital religious discussion and deep faith.

5. We never heard the Church center called a compound until this tragedy. It was a religious center for worship, living, work, education and recreation. It is outrageous and ridiculous, and certainly contemptuous, to call the center a fortress. It was church and home. To say the "fort style" of the Church was a reflection of David's apocalyptic mentality is not at all true. Many people contributed to the way the Church building grew, like Topsy perhaps, but serviceable for religious services and studies with its large chapel and adjacent areas for study and prayer; for living with large kitchen and dining room areas and small private family quarters with a gym, pool and outdoor

areas and equipment for recreation. It was made of cheap wood, homemade construction and not fancy, but we loved it.

6. David was a serious Bible scholar from childhood. He read and discussed the Bible and religion constantly. It was real and important to him. He could quote more, and more accurately, from the Bible than anyone I ever knew. After all he was surrounded by people who read the Bible every day often for hours. Of course David was thoroughly familiar with the Golden Rule and often discussed it. He believed in it. Judge Smith doesn't know anything about David's religion and has no basis to condemn it or to call it paramilitary, or to call David a false prophet. Our Church believes in prophecy and prophets. We search the Bible for the truth. We love our children, try to teach them to be good people and Judge Smith has no right to judge David or our religion. We will let the Lord tell us who the true prophets are.

7. David changed his name from Vernon Wayne Howell to David Koresh, under God's guidance, partly because of Bible prophecy having to do with the last days, and partly to help forward his religious music. The name David Koresh had symbolic meaning for this time. He changed his name legally down at the Courthouse. Judge Smith has no right to place a slur on his choice of name, and shows prejudice by so doing. I accepted David's new name and believe that all the other Church members did as well.

8. Judge Smith's claim that David had exclusive access to all female followers above the age of twelve, including the wives and daughters of his male disciples shows a lack of understanding of our religious beliefs. His statement is a malicious insult to all Church members and our religion, designed to make us appear licentious and duped. No decent person would spread these prejudicial statements around

without seeking to study and understand the truth for our Biblical point of view.

9. I have followed Judge Smith's words and acts since the tragedy at Mt. Carmel and believe he is deeply hateful of our religion, our Church and even our dead. I do not believe our Church, religion, our Members who died in this tragic assault by government, including my son and grandchildren can possibly get a fair trial before Judge Smith, or that any reasonable and knowledgeable person would believe we could.

/s/_____
Bonnie Clark Haldeman

SWORN TO AND SUBSCRIBED before me
on the 23 day of May, 1996.

My commission expires : 6-4-96

NOTARY PUBLIC, State of Texas

/s/_____
Marilyn Lust

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
WACO DIVISION

DOCKET NO. W-96-CA-142
JUDGE WALTER S. SMITH, JR.

DEBBORAH BROWN, et al.,	)
Plaintiffs,	)
	)
-VERSUS-	)
	)
UNITED STATES OF AMERICA, et al.,	)
Defendants.	)
	)

STATE OF TEXAS)
) SS.
COUNTY OF)

AFFIDAVIT OF CLIVE DOYLE

Before me, the undersigned authority, personally appeared Clive Doyle, who, being by me duly sworn, deposed as follows:

1. My name is Clive Doyle. I was a defendant in United States v. Brad Eugene Branch, et al., W-93-CR-146. I was found not guilty of all charges against me.

2. I have been a member of the Seventh Day Adventist Church since 1951 and of the Mt. Carmel Church since 1957. I am a plaintiff in this civil suit, suing for the death of my youngest daughter, Shari, age 18, whom I was unable to save during the fire on April 19, 1993.

3. I have been asked by my lawyers to give this affidavit in support of a motion by plaintiffs asking that Judge Walter S. Smith, Jr., be disqualified from presiding over the case.

4. I thought Judge Smith was prejudiced against the defendants, our Church and religion from the time he selected the jury through the time he sentenced those defendants who were convicted of some minor charges. He did all the questioning of prospective jurors and asked questions like whether they belonged to main stream churches which reinforced the prejudice caused by his characterization of our religion as a cult and our Church as a compound. At trial he seemed to rule for the government on all important issues and he effectively prevented us from presenting evidence of self defense which made his final instructions on self defense on the murder counts not worth much. I never detected any concern on his part for the deaths of our children, families, Church and property but he was compassionate about the deaths of the four ATF agents. He didn't seem to be concerned about the way the government attacked our Church, knowing it was full of people, mostly women and children,

5. At the sentencing Judge Smith's prejudice seemed to run away with him. He went far beyond any evidence I heard and said things I know are not true when he said our religious beliefs taught that we "must bring about a violent conflict with federal agents." Our religious belief never caused us to want or bring about a violent conflict with federal agents, or anyone else. David Koresh never preached we should go looking for a fight with anyone. The ATF came after us. We had lived peacefully as a Church group in Waco for years without any trouble. We didn't go after them. All the evidence shows that. We didn't start the fire in the Church and our members didn't kill each other or commit suicide. Our religion is against suicide and we never discussed it. The fact that Judge Smith

made all those statements as fact show how prejudiced he is against us, just like his sentencing five church members acquitted of murder to 40 years as if they had been convicted.

6. Since our trial, Judge Smith has written and said things that reveal some great prejudice and hatred toward our Church and religion. He has said the press should have known how dangerous we were before February 28, 1993. We weren't and nobody thought we were, as far as I know. I consider we were on good terms with both the Sheriff's Office and the Police Department and there was no reason for them to consider us dangerous.

7. Judge Smith never attended our Church, met its members, heard our Bible discussions, sermons, or participated in our religious studies, yet he says our religious teachings did not focus on the Golden Rule, but on paramilitary training. The Golden Rule was read and discussed in the Church, probably everyday by someone, and probably more than any church Judge Smith ever attended. We believe in the Golden Rule and try to practice it.

8. Paramilitary training was never a part of our religious teaching. Our religious teaching comes from the Bible. A few of the men bought and sold guns and helped support the Church with the proceeds. Guns were also kept to protect the Church and its members. We live on earth, in Texas, and guns are part of the culture. The Bible teaches that there will be violent conflict on earth in the last days and that forces of evil will combat forces of good, but we never sought, or wanted violence, or combat and were not some kind of National Guard, or organized militia. We were religious people, studying, praying and living together in the exercise of our religion. We came from all over the world for that purpose. We loved our

lives at Mt. Carmel. If we hadn't, we could have and would have left, just as others had done in the past.

9. For Judge Smith to see the Church as a fortress, or a fort style building, is a reflection of his prejudice. No fortification expert would consider it a fort. It was a religious community center built pretty much with our own hands to serve our religious and living needs. For Judge Smith to write that David Koresh had "exclusive access to all female followers above the age of twelve, including the wives and daughters of his male disciples" reveals his ignorance and prejudice. Why the subject is proper for a legal opinion is not clear, but if the Judge wants to write about our religion he ought to study it and hear what those in the Church say so he could know what he is writing about. I don't know where he gets his facts, but he has become a major part of the effort of the government to demonize our religion and Church.

10. For Judge Smith to decide David Koresh is a "false prophet" in a case in which the Church cannot even defend itself is to set the courts above religion to decide what is true religion and what is false. We believe David Koresh was a true prophet.

11. I do not believe it is possible for us plaintiffs who are members, or relatives of members of the Mt. Carmel Church and believe in its religious teachings, and who seek justice and truth for the memories of our children, relatives and friends who died there, can possibly get a fair trial before Judge Smith. I believe it is important to freedom of religion and the integrity of the governments of the United States and of Texas that we get a fair trial and that the world believe it is intended to be fair.

_____

Clive Doyle

SWORN TO AND SUBSCRIBED before me

on the ____day of_____, 1996.

My commission expires:

NOTARY PUBLIC, State of Texas

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
WACO DIVISION

DOCKET NO. W-96-CA-142
JUDGE WALTER S. SMITH, JR.

DEBBORAH BROWN, et al.,)
Plaintiffs,)
)
-VERSUS-)
)
UNITED STATES OF AMERICA, et al.,)
Defendants.)

STATE OF TEXAS)
) SS.
COUNTY OF)

AFFIDAVIT OF SARAH L. BAIN

Before me, the undersigned authority, personally appeared Sarah L. Bain, who, being by me duly sworn, deposed as follows:

1. My name is Sarah L. Bain. I served on the trial jury in the case of United States v. Brad Eugene Branch, et al, W-93-CR-046. I was chosen to be Foreperson when the case was submitted to the jury. Information concerning me is available in the court records. I have been asked by lawyers for the plaintiffs in this case who have interviewed me to give this affidavit which I understand will be submitted in support of a motion by plaintiffs asking that Judge Walter S. smith, Jr., be disqualified from presiding over the case.

2. I never heard of Judge Walter S. Smith, Jr. before I was called for jury duty in this case.

3. During the trial I had the feeling that Judge Smith was favoring the prosecution in his rulings and heard several comments by jurors, or alternates to that effect.

4. During jury deliberations, it became clear that nearly all the jurors were deeply disturbed, as I was, by the extremely provocative acts of the ATF agents when they approached Mt. Carmel in mass and with helicopters on February 28, 1993. The testimony about harassment and taunting of Church members by the FBI during the 51 day siege was also very disturbing and I believe made peaceful resolution unlikely. Evidence of the six hour attack on the people including children at Mt. Carmel with gas and the huge tanks smashing into the building with so many people in it, and finally crushing the back end of the building was probably most disturbing of all. Some jurors said, and I fully agree, that the wrong people were on trial. The raid planners for both ATF and FBI should answer to charges. I never detected that any of the government activity upset Judge Smith.

5. We acquitted all defendants of the first two counts of conspiracy to murder and aiding and abetting murder. We did not believe the defendants ever planned, or intended to murder anyone. If we had understood that self defense applied to the lesser included offense of voluntary manslaughter we could have acquitted the five defendants we found guilty of voluntary manslaughter, who we had already found not guilty of murder. We thought it was a much less serious offense than murder and we hoped to emphasize that the actions of the ATF had "provoked" a reaction by the defendants.

6. The jury felt strongly that Judge Smith should be lenient. While waiting for the verdict to be read in open court, several of us voiced the opinion that Katherine Schroeder was going to regret being separated from the other defendants since the prison time they faced on all charges would surely be so much shorter than the prison time she faced. I was horrified when he imposed 40 year sentences on these men who had already lost family, friends, their home, their Church and their possessions. I believe Judge Smith not only ignored our verdict of not guilty of murder, but that he misused our jury and verdict to punish people he had come to scorn. I was present at the sentencing and could not believe Judge Smith was quoting as true a witness' testimony that the jury had found not credible. I found even more disturbing that he said we had found the five defendants guilty of murder by our guilty verdict on the firearm count. We unanimously found all defendants not guilty of murder. We never imagined a verdict on carrying or using a firearm could be twisted into a reversal of our clear decision that no defendant committed murder. Only a deep prejudice would so distort our decision.

7. The jury did not find and did not have evidence from which we could have found that the Church members ambushed the ATF. It is absurd to say people inside Mt. Carmel ambushed a large, heavily armed force of federal agents that observed the activities at Mt. Carmel for weeks as it planned a dynamic entry by force into the Church. We could not determine and did not decide the first shots were fired from inside the Church. Nor could we determine that the helicopters did not fire on the Church, in part because the gunfire heard on the helicopter video tape sounded too close and too clear to have come from the ground. The evidence certainly did not justify calling the church a fortress or a compound. It was just a large frame building which provided no protection to those inside. Shots fired from the ATF often passed through several

walls and the tanks smashed right through the walls, well into the interior of the building. There was no evidence to support a claim that all but a handful of the church members committed suicide or murdered each other. We were troubled by the autopsy reports stating that there were 15 or so bodies with gunshot wounds. But there was no evidence to support that nearly all the 74 deaths were a result of "suicide and murder inflicted by Davidian on Davidian." The jury did not determine that Church members started the fire. After the FBI had cut off the electricity necessitating the use of Coleman lanterns and after six hours of gassing and tanks smashing a fragile frame building, anything could have started the fire. Judge Smith could only make such statements if he bore some prejudice against the defendants and their Church and other possibilities did not matter to him.

8. I consider myself to be a reasonable person. I firmly believe that any reasonable person reviewing all the facts fairly would have grave doubts, as I do, about the ability of Judge Smith to preside impartially over a trial in which the rights of the Mt. Carmel Church and its members are being asserted against the U.S. government and government agents for the injuries, deaths and devastation that occurred at the Church in 1993.

_____

Sarah L. Bain

SWORN TO AND SUBSCRIBED before me on the 22 day of May, 1996.

My commission expires: 5-21-97

/s/_____

NOTARY PUBLIC, State of Texas

List of Parties

The Petitioners herein are as follows:

The Estates of : Alrick George Bennett; Diane Martin; Beril Teresa Nobrega, Winston Blake; Pablo Cohen; Yvette Fagan; Doris Adina Fagan; Zillah Henry; Diana Henry; Vanessa Henry; Paulina Henry; Philip Graham Henry; Stephen George Henry; Peter Hipsman; Perry Jones; Michelle Jones; Jeffrey Curtis Little; John McBean; Allison Monbelly; Rosemary Morrison; Livingston Malcolm; Sherry Lynn Gallegos Jewell; James Loyle Riddle, Jr.; Michael Dean Schroeder; Lorraine Sylvia; Nicole Elizabeth Gent Little; Peter Bruce Gent; Jaydean Cornwell Wendel; Mark Wendel; Joaquin Dones; Solomon Malcolm, Sr.; Shari Doyle; Floyd Houtman Sr.; Raymond Friesen; Novellette Hipsman Sinclair; Neil Vaega; Rebecca Saipaia; Rachel Jones Howell Koresh; Michelle Jones Koresh; David Jones; Shari Doyle; Anita Martin; Douglas Wayne Martin; Wayne Joseph Martin; Lisa Martin; Sheila Martin; Little One Jones Koresh; Serenity Sea Jones Koresh; Chica Jane Koresh; David Jones; Rachel Jones Koresh; Floyd Houtman, Sr.; Raymond Friesen; Novellette Hipsman Sinclair; Neil Vaega; Rebecca Saipaia; Margarita Gehrman Vaega; Scott Sonobe; Florecita Rivera Sonobe; Lisa Marie Farris; David Koresh.

Jean Holub, Co-Administrator and Legal Representative of Estate of Bobbie Lane Koresh, Star Hadassah Howell and Cyrus Ben Joseph Howell, Minors, Deceased;

Jean Holub, Co-Administrator and Legal Representative of Estate of Bobbie Lane Koresh, Star Hadassah Howell and Cyrus Ben Joseph Howell, Minor children Deceased and another;

Norman Washington Allison, Nicole Bennett, Adeline Sylvia Black, Lowess Blake, Robert Blake, Debborah Brown, Isabel G. Andrade, Sherry Ann Burgo, Patricia Fagan, Jorge Cohen, Raul Cohen, Shulamit Cohen, Bloston Fagan, Delroy Fagan, Fitz Earnest Fagan, Livingston Fagan, Nehara Fagan, Patrick Fagan, Renae Fagan, Renford Fagan, Robert Fagan, Rosely Fagan, Elizabeth Gyarfas, Oliver Gyarfas, Sr., Samuel O. Henry, Catherine Hipsman, Eugene Hipsman, Jr., Eugene Hipsman, Sr., Filomena Hipsman, John C. Hipsman, Michael R. Hipsman, Mildred Hipsman, Paul J. Hipsman, Stephan Hipsman, Dana Houtman, Floyd Houtman, Jr., Samuel Hones, Lonnie Little, Patricia Little, Derek Lovelock, Solomon Malcolm, Jr., Daniel Martinez, Jr., Lucilda McBean, Ransford McBean; Josephart Monbelly, Mary Anne Monbelly, Michael Morrison, Nellie Morrison, Ruth Mosher, Andrew Nobrega, Natalie Nobrega, Vincent Nobrega, Wayne Nobrega, Myrtle Riddle, Scott Schroeder, Joshua Sylvia, Stanley Sulvia, Marlene Thompson, Jaunessa Wendel, Shaun Wisdom Howell Koresh, Clive Doyle, Katherine Farris, Tillie Friesen, Bruch Gent, Ursula Gehrmann, Joan Vaega, Bonnie Haldeman, Floyd Hotman, Fr., Joel Jones, Katherine Jones, Kevin Jones, Mark Jones and Heather Jones, Mary Belle Jones, Sheila Judith Martin, Sheila Martin, Daniel Martin, James Martin, Kimberly Martin, Dana Okimoto, Jared Michael Okimoto and Sky Born Okimoto, Anacleto Rivera, Cirila Rivera, Elpedio Rivera, Emmanuel Rivera, Jessie Rivera, Joel Rivera, Rene Rivera, Rose Rivera, Mrs. Lona Saipaia, Ofilia Santoyo, John sinclair, Dorothy Forde Sinclair, Reginald Sinclair, Kenneth Goro Sonobe, Angelica Sonobe, Crystal Sonobe, Vailo Vaega, Collette Sincalir Wynn, Grace jasmine Adams, Enda Doyle, Karen Doyle, Sina Saipaia, Willie Saipaia, Albert Vaega, Allen Vaega, Aulepoia Vaega, George Vaega, Leslie M. Vaega, Nese Vaega, David Thibodeau, and The General Association of the Branch Davidian 7th Day Adventist.

Other Parties to the Appeal below are as follows:

The estates of Chanel Andrade, Crystal Barrios, Isaiah Barrios, Dayland Lord Little, Kara Brittani (Pages) Little, Abigail Martinez, Audrey Martinez, Joesph Martinez, Melissa Morrison, Mayanah Schneider, Aisha Gyarfas Summers, Startle Summers, Hollywood Sylvia, and Rachel Sylvia; Daniel Martinez, Sr.; Thomas Barrios; Misty Dawn Ferguson; Stanley Sylvia

Davy Aguilera, William Buford, James Cavanaugh, Phillip Chojnacki, Daniel Conroy, Edward Dennis, Jr., Earl Dunagan, Darrell Dyer, Danie Hartnett, Stephen Higgins, Lon Horiuchi, Webster Hubbell, Jeffrey Jamar, William Johnston, Peter Mastin, Lawrence Potts, Janet Reno, Oliver Revell, Robert Ricks, Robert Rodriguez, Richard Rogers, Ted Royster, Byron Sage, Charles Sarabyn, William Sessions, David Troy, United States of America.

Supreme Court, U.S.
FILED
FEB 11 2004
OFFICE OF THE CLERK

(1) (2)

Nos. 03-838 and 03-849

In the Supreme Court of the United States

STEPHEN E. THOMPSON, ADMINISTRATOR FOR THE ESTATE OF CHANEL ANDRADE, ET AL., PETITIONERS

v.

PHILLIP J. CHOJNACKI, ET AL.

DEBBORAH BROWN, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

THEODORE B. OLSON
Solicitor General
Counsel of Record

PETER D. KEISLER
Assistant Attorney General

MARK B. STERN
CHARLES W. SCARBOROUGH
Attorneys

Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

BEST AVAILABLE COPY

QUESTION PRESENTED

Whether the district judge was required to disqualify himself from this case.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	2
Statement	2
Argument	8
Conclusion	14

TABLE OF AUTHORITIES

Cases:

Alexander v. *Primerica Holdings, Inc.*, 10 F.3d 155 (3d Cir. 1993)	13
Andrade v. *Chojnacki*, 65 F. Supp. 2d 431 (W.D. Tex. 1999)	3
Bieber v. *Department of the Army*, 287 F.3d 1358 (Fed. Cir. 2002)	11, 12
Branti v. *Finkel*, 445 U.S. 507 (1980)	10
Goodman v. *Lukens Steel co.*, 482 U.S. 656 (1987)	10
Litjeberg v. *Health Servs. Acquition Corp.*, 486 U.S. 847 (1988)	8-9
Liteky v. *United States*, 510 U.S. 540 (1994)	7, 9, 10
Sao Paulo State of the Federative Rep. of Brazil v. *American Tobacco co.*, 535 U.S. 229 (2002)	9
Tiffany Fine Arts, Inc. v. *United States*, 469 U.S. 310 (1985)	10
United States v. *Barrett*, 111 F.3d 947 (D.C. Cir.), cert. denied, 522 U.S. 867 (1997)	13

Statutes and regulations:

Federal Tort Claims Act:	
28 U.S.C. 1346	2
28 U.S.C. 2671 *et seq.*	2
28 U.S.C. 455(a)	8
28 U.S.C. 455(b)(1)	8

In the Supreme Court of the United States

No. 03-838

STEPHEN E. THOMPSON, ADMINISTRATOR FOR THE ESTATE OF CHANEL ANDRADE, ET AL., PETITIONERS

v.

PHILLIP J. CHOJNACKI, ET AL.

No. 03-849

DEBBORAH BROWN, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 7a-34a) is reported at 338 F.3d 448.[1] The opinion of the district court denying petitioners' second recusal motion (Pet. App. 35a-56a) is reported at 116 F. Supp. 2d 778. An earlier opinion denying petitioners' recusal motions (Pet. App. 57a-73a) is unreported.

[1] Unless otherwise indicated, references to "Pet. App." are to the Appendix to the petition for certiorari in No. 03-838.

JURISDICTION

The judgment of the court of appeals was entered on July 14, 2003. A petition for rehearing was denied on August 27, 2003. The petitions for a writ of certiorari were filed on December 8, 2003. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. This case arises out of a 1993 gun battle and standoff between federal officials and members of the Branch Davidian religious group in Waco, Texas. The incident resulted in the deaths of numerous individuals, who perished when certain Davidians set fire to their compound rather than yielding to lawful authority. Pet. App. 41a-48a. Petitioners are two separate groups of surviving Davidians and the relatives and estates of deceased Davidians, who have been separately represented at all relevant times in this case. Petitioners brought suits for damages against the United States and individual federal and state officials, alleging claims under the Constitution, Texas law, the Federal Tort Claims Act (FTCA), 28 U.S.C. 1346, 2671 *et seq.*, and other federal statutes. Pet. App. 13a.

Petitioners' claims were consolidated for trial before Judge Walter Smith, the only federal district court judge in Waco. Pet. App. 14a. Petitioners moved to recuse Judge Smith from this case, arguing primarily that his rulings and comments in prior civil and criminal cases involving the incidents at issue in this suit demonstrated that he was biased against Davidians generally and had "prejudged" the facts of this case. Judge Smith denied the recusal motion, *id.* at 57a-73a, and the court of appeals denied petitions for a writ of mandamus seeking Judge Smith's recusal or transfer to a different venue, see *id.* at 14a.

On July 1, 1999, Judge Smith dismissed petitioners' constitutional claims against all but one of the individual defendants and held that the discretionary function exception to the FTCA precluded most of plaintiffs' negligence claims against the United States. See *Andrade* v. *Chojnacki*, 65 F. Supp. 2d 431 (W.D. Tex. 1999). After allowing discovery on the remaining issues, Judge Smith empaneled an advisory jury. Trial on the remaining FTCA claims was held from June 19 through July 14, 2000. Pet. App. 15a.

The advisory jury found that the United States had not acted negligently in any respect, and Judge Smith subsequently issued findings of fact and conclusions of law rejecting petitioners' claims in their entirety. Pet. App. 35a-56a. In that ruling, Judge Smith also denied a second motion for recusal filed by petitioners, explaining that none of their allegations of improper conduct "either singularly or combined, forms a legal basis for recusal." *Id.* at 36a. Both the *Andrade* and *Brown* petitioners appealed the final judgment in favor of the government.

2. On appeal, petitioners did not challenge any of the district court's rulings on the merits. Instead, as the court of appeals emphasized at the beginning of its opinion, their "only serious contention is that Judge Smith—on account of his relationships with defendants, defense counsel, and court staff; prior judicial determinations; and comments during [the] trial—should have recused himself from hearing their claims." Pet. App. 13a. The court of appeals rejected petitioners' arguments in their entirety, holding that their "allegations do not reflect conduct that would cause a reasonable observer to question Judge Smith's partiality." *Ibid.*

The court of appeals began its analysis with a discussion of general recusal principles. Pet. App. 16a-19a. Among other things, the court emphasized that the standard for whether a judge's impartiality might reasonably be questioned is objective rather than subjective; that review under

that standard "should entail a careful consideration of context, that is, the entire course of judicial proceedings, rather than isolated incidents"; and that recusal is generally not required unless events during the trial or opinions expressed by the judge are based on an "extrajudicial" source. *Id.* at 17a-18a. In light of those principles, the court stated that petitioners were required to clear a number of "hurdles" to obtain Judge Smith's recusal: "They must (1) demonstrate that the alleged comment, action, or circumstance was of 'extrajudicial' origin, (2) place the offending event into the context of the entire trial, and (3) do so by an 'objective' observer's standard." *Id.* at 18a-19a. Because petitioners were also required to "demonstrate that the district court's refusal to recuse was not merely erroneous, but, rather, an abuse of discretion," the court of appeals concluded that it was "hardly surprising" that they failed to clear those hurdles. *Id.* at 19a.

a. Turning to the separate allegations of "extrajudicial" bias,[2] the court stated that two of the events "may be dismissed without exhaustive consideration" because "[o]ne is trivial," and "the second moot." Pet. App. 19a.

First, the court rejected petitioners' argument that government counsel created an appearance of impropriety by giving food and T-shirts to certain employees in the marshal's and court reporter's office during the trial. Citing Judge Smith's uncontested factual findings that the gift of T-shirts was a "prank," and that "none of the recipients were 'members of the Court's staff,'" the court of appeals stated: "[W]e fail to see how these small courtesies to the court's non-judicial staff could be viewed by any 'objective' observer as compromising Judge Smith's independence." Pet. App. 19a-20a.

---

[2] The court noted that several of the events could "more appropriately be characterized as having occurred during the judicial proceedings," but "for simplicity" the court accepted petitioners' characterization of the events as extrajudicial. Pet. App. 19a n.2.

Second, the court rejected the claim "that Judge Smith's longstanding relationships with two of the dismissed defendants, William Sessions and William Johnston," which consisted of Johnston's frequent appearances before Judge Smith and Sessions' service from 1983-1987 on the district court bench with Judge Smith, created any appearance of impropriety. Pet. App. 20a. Because "both Sessions and Johnston were dismissed from the case in July 1999," the court held that this issue was moot, and noted further that "[i]n any event, no facts are proven to suggest that either prior relationship evinces characteristics that would even suggest, much less mandate recusal." *Ibid.*[3]

The court next concluded that, when properly viewed in context, one comment Judge Smith allegedly made during trial—that he had not read certain evidence relating to one of petitioners' claims—was "unproblematic." Pet. App. 20a-21a. The court explained that the evidence the district court allegedly ignored was designed to support an argument that the FBI negligently failed to develop a plan to extinguish fire at the Davidians' compound—an argument that was "almost surely barred from consideration" under the discretionary function exception to the FTCA. *Id.* at 21a. "[B]ecause the applicability of the discretionary function exception does not turn on evidence of the actual decisions made by the defendants, but, rather, on whether the decision is or is not 'susceptible to policy analysis,'" the court of appeals stated that "Judge Smith had no need to examine the evidence supporting this claim." *Ibid.* (citations omitted). As a result, the court of appeals concluded, "Judge Smith's preference not to read the evidence—and

---

[3] On a related matter, the court held that Judge Smith's expressions of support for Johnston during an investigation of Johnston in September 2000 were "irrelevant" to petitioners' recusal arguments because "Johnston had been dismissed from this case in July 1999—15 months before this incident occurred." Pet. App. 23a.

his declaration—cannot constitute evidence of bias or even the appearance of such." *Id.* at 21a-22a.[4]

Likewise, the court of appeals held "unproblematic," Pet. App. 20a, Judge Smith's comment that he would be willing to disregard the advisory jury's verdict. The court noted that, although Judge Smith had granted petitioners' request for an advisory jury (over the government's objection), "the FTCA does not grant plaintiffs the right to a jury trial." *Id.* at 22a. Accordingly, the court concluded, Judge Smith's "statement accurately, if bluntly, reflected the status of the advisory jury verdict." *Ibid.*

The court next rejected allegations that Judge Smith's alleged compliment to James Touhey on what petitioners characterized as a "particularly vicious cross-examination of Davidian witness Clive Doyle" demonstrated impermissible bias. Pet. App. 23a. Noting that remarks hostile to counsel or parties almost never provide a basis for recusal, the court emphasized that such comments must be evaluated with reference to objective standards rather than those of a "hypersensitive, cynical and suspicious person." *Id.* at 24a. The court concluded that it "sees a compliment, not a subliminal message of wrongful bias," in Judge Smith's comment. *Ibid.* (internal citations omitted).

Finally, the court of appeals rejected petitioners' arguments that certain comments attributed to Judge Smith in a newspaper article authored by Lee Hancock provided grounds for recusal. Pet. App. 24a-29a. Because petitioners "never brought this article to the district court's attention," the court concluded that "their fulminations lack record support and context," and held that it "cannot review this claim." *Id.* at 26a. Among other things, the court emphasized that petitioners had an opportunity to

---

[4] The court of appeals also noted that petitioners elected not to appeal the district court's ruling on the applicability of the discretionary function exception. Pet. App. 22a.

supplement the district court record and bring the article to Judge Smith's attention but failed to do so. *Id.* at 27a-28a. As a result, the court explained, petitioners' "argument ultimately asks this court to judge the judge based exclusively on the fact of publication of his remarks, without context and without verification of their accuracy." *Id.* at 28a. Under those circumstances, the court held that the "complaint about the newspaper article was not properly preserved for appellate review." *Ibid.*

b. The court of appeals also rejected petitioners' arguments that Judge Smith's recusal was required based upon "eight events that occurred on the record during judicial proceedings." Pet. App. 29a. Citing this Court's decision in *Liteky* v. *United States*, 510 U.S. 540 (1994), the court emphasized that the first six of the events involved "the type of opinions/expressions that *Liteky* holds nearly exempt from causing recusal." Pet. App. 31a. The court also rejected petitioners' contention that "*Liteky* either does not apply or should not apply as rigorously when, as in this FTCA case, the judge is the factfinder." *Id.* at 31a-32a. Noting that "[j]udges often find facts in performing their duties—in admitting evidence, in sentencing criminals, in ruling on motions, as well as in deciding bench-tried cases," the court concluded that "*Liteky* draws no distinction based on the type of proceeding, and none is warranted." *Id.* at 32a.

In addition, the court rejected arguments for recusal based on two other events that petitioners "could have, but did not, appeal." Pet. App. 32a. Because "one of these involves the irrelevant advisory jury and one a grievously late attempt to create a factual record for appeal," the court of appeals concluded that allowing "the judge's demeanor or actions in the two events a significant influence on our recusal decision would be grossly disproportionate to the legal implications of his actions." *Ibid.*

Finally, the court of appeals acknowledged that events in court could, in rare circumstances, "reveal such a high degree of favoritism or antagonism as to make fair judgment impossible." Pet. App. 32a (quoting *Liteky*, 510 U.S. at 555). However, the court explained, "[a]mong the events cited above, only one—Judge Smith's ill-tempered references to [Branch Davidian witness Livingston] Fagan—even arguably fall[s] within that deplorable range." *Ibid.* Because "those brief comments in the course of a decade of litigation refer only to one witness, not to the Davidians or Appellants in general or to the merits of their case," the court of appeals held that they did not establish bias or partiality warranting recusal.[5] *Ibid.*

ARGUMENT

The fact-bound decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. The court properly applied established principles for judicial recusal in affirming the district judge's decision not to disqualify himself from this case. Although petitioners seek to re-litigate a host of factual issues relating to recusal, this Court does not normally grant review to revisit consistent factual findings by two lower courts. Moreover, neither of the two legal questions petitioners have identified is squarely presented in this case and neither involves an important question of law on which the courts of appeals are divided. Accordingly, further review is not warranted.

1. a. A federal judge is required to "disqualify himself in any proceeding in which his impartiality might reasonably be questioned." 28 U.S.C. 455(a). Recusal is also

---

[5] The court also held that the *Andrade* petitioners had waived any argument other than recusal by limiting their opening brief to that issue, Pet. App. 33a, and that the *Brown* petitioners had offered no "argument in law for the reversal of the district court's judgment." *Id.* at 34a.

required where a judge "has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceedings." 28 U.S.C. 455(b)(1). Those statutory provisions are designed to avoid even the appearance of impartiality, and they establish an objective standard requiring recusal where a judge's "impartiality might be reasonably questioned." *Liljeberg* v. *Health Servs. Acquisition Corp.*, 486 U.S. 847, 861 (1988). As this Court has recently cautioned, however, the determination as to whether a judge's partiality might reasonably be questioned requires careful consideration of context and the entire course of judicial proceedings, rather than merely a focus on isolated incidents. See *Sao Paulo State of the Federative Rep. of Brazil* v. *American Tobacco Co.*, 535 U.S. 229, 232-233 (2002).

In addition, it is well-established that "opinions formed by the judge on the basis of facts introduced or events occurring in the course of the current proceedings, or of prior proceedings, do not constitute a basis for a bias or partiality motion unless they display a deep-seated favoritism or antagonism that would make fair judgment impossible." *Liteky*, 510 U.S. at 555. Likewise, "judicial rulings alone almost never constitute a valid basis for a bias or partiality motion." *Ibid.* In short, recusal is generally not required unless some "extrajudicial" source of bias has infected the proceedings.

b. The court of appeals correctly applied the foregoing recusal standards in holding that the district judge did not abuse his discretion by declining to disqualify himself from this case. After a careful review of the various incidents alleged to demonstrate both extrajudicial and intrajudicial bias, Pet. App. 19a-32a, the court found no grounds for recusal and concluded that petitioners had waived any arguments on appeal other than recusal. *Id.* at 33a-34a.

The *Andrade* petitioners contend that the decision below "represents an egregious departure from the ac-

cepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision." 03-838 Pet. 20. They nowhere identify, however, any way in which the court misstated or misapplied settled recusal standards. Instead, they simply reiterate the same factual arguments that the court of appeals carefully considered and rejected, asserting primarily that Judge Smith's comments and rulings in this case and prior cases demonstrate both intrajudicial and extrajudicial bias warranting recusal.[6]

As recounted above, the court of appeals concluded that none of the alleged incidents identified by petitioners, either by themselves or combined, established any grounds requiring Judge Smith to recuse himself from this case. The fact-bound and record-specific nature of those conclusions confirms that further review by this Court is unwarranted. Indeed, it is well-established that this Court generally will not revisit the "concurrent findings of fact by two courts below." *Goodman* v. *Lukens Steel Co.*, 482 U.S. 656, 665 (1987). See also *Tiffany Fine Arts, Inc.* v. *United States*, 469 U.S. 310, 317-318 n.5 (1985); *Branti* v. *Finkel*, 445 U.S. 507, 512 n.6 (1980).

In any event, petitioners offer no persuasive grounds for second-guessing the court of appeals' determination that recusal was unwarranted in this case. Relying heavily on comments by Judge Smith based on facts and events occurring during these and prior judicial proceedings, the *Andrade* petitioners contend that those comments demonstrate a high degree of antagonism toward them, which made fair judgment impossible. 03-838 Pet. 21-24. As the court of appeals recognized, however, "'expressions of impatience, dissatisfaction, annoyance, and even anger' do not establish bias or partiality." Pet. App. 32a (quoting

[6] Likewise, the *Brown* petitioners repeat the same litany of factual allegations rejected by the court of appeals to support their contention that an objective observer "would entertain reasonable questions about Judge Smith's impartiality in this case." 03-849 Pet. 9-24.

Liteky, 510 U.S. at 555-556). The court correctly concluded that none of those comments, especially when viewed in the context of a decade of contentious litigation, demonstrated impermissible bias requiring recusal.

Petitioners' reliance on several incidents allegedly demonstrating "extrajudicial" bias is equally unavailing. As in the court of appeals, the *Andrade* petitioners contend that Judge Smith's praise for a "particularly vicious cross-examination" conducted by James Touhey, and the provision of small "gifts" to court employees, including U.S. Marshals employed by the Justice Department, created an impermissible appearance of impropriety. 03-838 Pet. 24-29. After placing each of those incidents in the proper context, however, the court of appeals correctly concluded that neither would cause an objective, well-informed observer—as opposed to a "hypersensitive, cynical, and suspicious person"—to question the court's impartiality. Pet. App. 24a. Indeed, as the court of appeals noted, even if the gifts by government attorneys of food and T-shirts to federal marshals and individuals in the clerk's office could somehow be deemed inappropriate, those events were entirely beyond Judge Smith's control and thus could not reasonably "be viewed by any 'objective' observer as compromising Judge Smith's independence." *Id.* at 20a.[7]

2. The *Andrade* petitioners also contend that this case presents two significant legal issues. 03-838 Pet. 7-20. Neither warrants further review.

a. Petitioners argue first that review by this Court is warranted to address what they contend is an unresolved and important question: whether a more stringent stan-

[7] Petitioners' cursory recitation of "other evidence of bias," 03-838 Pet. 29, is simply a list of allegations that the court of appeals exhaustively considered and rejected. Likewise, the various examples of Judge Smith's alleged bias against Davidians offered by the *Brown* petitioners, 03-849 Pet. 9-24, add nothing to the categories of allegations considered and rejected by the court of appeals.

dard for recusal than that employed in *Liteky* applies where the trial judge is also the factfinder in a case. 03-838 Pet. 7-17. Petitioners, however, cite no conflict in the circuits on this question, or even any post-*Liteky* decision suggesting that a more stringent recusal standard is applicable in these circumstances. To the contrary, petitioners concede (*id.* at 9) that the only other post-*Liteky* decision to address the issue, *Bieber* v. *Department of the Army*, 287 F.3d 1358 (Fed. Cir. 2002), reached a conclusion consistent with the court of appeals in this case: that the same standard for recusal "ought to apply regardless of whether the trier of fact is a jury or judge." *Id.* at 1363.

In light of this uniform post-*Liteky* precedent, petitioners criticize both the court of appeals in *Bieber* and the court of appeals in this case for failing adequately to analyze the significance of a judge's role as a factfinder in formulating appropriate recusal standards. The court of appeals, however, fully considered petitioners' argument "that *Liteky* either does not apply or should not apply as rigorously when, as in this FTCA case, the judge is the factfinder" and concluded that there was "no support for this position legally or logically." Pet. App. 31a-32a. Because "[j]udges often find facts in performing their duties—in admitting evidence, in sentencing criminals, in ruling on motions, as well as in deciding bench-tried cases," the court correctly concluded that no different recusal standard was warranted based on the type of proceeding at issue. *Id.* at 32a.

Petitioners offer no compelling rationale for a heightened recusal standard in cases where a judge is also the fact-finder. Nor do they identify any principles to differentiate the circumstances in which their higher standard would apply from those in which the judge is "only" admitting evidence, ruling on motions, or sentencing criminals and in which the *Liteky* standard would presumably continue to govern. Instead, petitioners rely (03-

838 Pet. 10) solely on several pre-*Liteky* decisions suggesting that a "judge's role as trier of fact is a weighty consideration" in the decision whether to recuse. Because those decisions predate *Liteky*, however, they are of minimal instructive value, and they certainly provide no support for petitioners' assertion that "clarification is needed as to whether the *Liteky* standard applies to cases where a judge has predetermined fact issues in prior cases." *Id.* at 13.[8] On that issue, the post-*Liteky* decisions are fully consistent, and review by this Court is therefore not warranted.

b. Finally, the *Andrade* petitioners' contention (03-838 Pet. 17-19) that this Court should grant certiorari to address the question whether harmless error analysis applies to recusal motions filed prior to judgment is also without merit. The applicability of harmless error analysis is not presented in this case, because the court of appeals nowhere found that recusal was warranted but held that Judge Smith's failure to recuse was harmless. To the contrary, the court's sole discussion of "harmless error" was a single reference to that standard in the course of holding that petitioners had waived all claims of error other than recusal. Pet. App. 33a. Thus, regardless of whether some courts of appeals have questioned the applicability of

---

[8] Likewise, the *Andrade* petitioners' reliance (03-838 Pet. 13) on a monograph published by the Federal Judicial Center to suggest that there is widespread confusion over the applicable standards for recusal in a bench trial is misplaced. Citing one of the pre-*Liteky* decisions that mentions this issue, *Alexander* v. *Primerica Holdings, Inc.*, 10 F.3d 155 (3d Cir. 1993), the monograph simply raises the question whether it might be prudent for judges to follow a different recusal standard in a bench trial. Pet. App. 82a. As the next page in the monograph makes clear, however, although at least one post-*Liteky* court has recognized that "recusal might well be prudent when a perjury bench trial involves testimony from a proceeding over which the same judge presided," that court has squarely held that "section 455(a) does not require it." Pet. App. 83a (quoting *United States* v. *Barrett*, 111 F.3d 947, 951 (D.C. Cir.), cert. denied, 522 U.S. 867 (1997).)

harmless error analysis to recusal motions filed prior to judgment, see 03-838 Pet. 18-19, this case does not present a suitable vehicle for addressing that issue.[9]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

THEODORE B. OLSON
Solicitor General

PETER D. KEISLER
Assistant Attorney General

MARK B. STERN
CHARLES W. SCARBOROUGH
Attorneys

FEBRUARY 2004

---

[9] Nor is review by this Court warranted to address the two questions other than recusal posed by the *Brown* petitioners: whether petitioners were denied a fair trial, and whether petitioners adequately preserved arguments for reversing the district court's judgment. 03-849 Pet. 24-30. The court of appeals' fact-bound ruling that the *Brown* petitioners had offered "no argument in law for the reversal of the district court's judgment," Pet. App. 34a, was correct and, in any event, provides no grounds for review by this Court.